



**Informing Progress** - Shaping the Future

# **Preparation of financial loss claims – an examination of various heads of claim**

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- Various heads of financial loss in personal injury claims
- Expert reports
- Loss of earnings
- Pension loss
- Accommodation claims – *Swift v Carpenter*
- Other considerations re financial loss - PPO
- Questions

# Various heads of claim

- Loss of earnings
- Loss of pension benefits
- Cost of care
- Case management costs
- Aids and equipment costs
- Prosthesis
- Occupational therapy costs
- Physiotherapy costs
- SALT (Speech & Language Therapy) costs
- Assistive technology costs

# Various heads of claim

- Behavioural therapy costs
- Hydrotherapy costs
- Psychology costs
- Alternative therapy costs
- Music therapy costs
- Dietician costs
- Tuition costs
- Additional schooling costs
- Additional travel costs
- Additional vehicle costs

# Various heads of claim

- Laundry costs
- Additional holiday costs
- Additional heating costs
- Additional wear and tear
- Accommodation costs (including for holiday homes)
- Private medical costs
- Loss of services
- Loss in the lost years, including loss of earnings and loss of pension
- Accountancy costs
- Deputyship costs
- Cost of Court of Care and Protection

- Medical reports
  - Life expectancy
    - But for
    - Result of
  - Impact of injuries
    - Can the Plaintiff return to employment, if so:
      - *When should they have done so or will be able to do so;*
      - *What type of employment, is there any restrictions;*
      - *Will there be a reduction in their working life, and if so when; and*
      - *Will they require future surgery.*
    - Implications for care, loss of services etc
  - Pre-existing conditions
    - Was there pre-existing or other comorbid conditions, if so how would they have:
      - *Impacted the Plaintiff's ability to work – early retirement, reduce working hours, change nature of employment; and*
      - *Need for care, therapies, ability to carry out services.*

- Care
- Occupational therapy
- Physiotherapy
- Prosthesis
- SALT
- Assistive technology
- Behavioural therapy
- Physiotherapy
- Accommodation

- Loss of employment or unable to return full time
- Restriction in career choice
- Loss of promotion
- Delay in career progression
- Risk of periods out of work / having to leave work early
- Alternative employment
  - Is it more risky
  - Chances of promotion
- Loss of benefits e.g. company car / other allowances
- Loss of overtime



# Loss of earnings - information / considerations

- Medical evidence
- Earnings records for at least one year prior to the cause of action or longer if earnings vary
- HMRC record of earnings (to assess periods of unemployment, lower earnings, etc)
- Education and employment history (particularly if the Plaintiff is young, if commenced a new job shortly before the cause of action or has a patchy work history)
- Comparable employee earnings, if there is high overtime, pay increases above the norm, etc
- Employment sickness record (to assess absences prior to cause of action, particularly if there are pre-existing health issues)
- Discussion with employer
- Annual appraisals (to assess promotion if claimed etc)
- Specific industry issues to be considered which may have led to the Plaintiff not remaining in employment, reduction in overtime etc, promotion freezes / lack of opportunity, early retirement
- Self-employed Plaintiffs the following information may be required
  - Tax returns & accounts for 3 years prior to the cause of action and all afterwards
  - Bank statements
  - Record of income and expenses
  - Diary of bookings etc
- Social security application forms
- Surveillance
- Social media

- Two types of pension scheme –
  - 1) **Defined Benefit**
  - 2) **Defined contribution**
- Defined benefit – now mostly public sector type employments
  - Based on value of the actual pension from retirement. The value of these can be quite substantial
- Defined contribution – most others including auto-enrolment
  - Based on loss of employer's contribution which can vary significantly

# Loss of pension - information / considerations

- Were they in an employer's pension scheme, if so which type (defined benefit or defined contribution)
- Defined benefit
  - Which scheme
  - When did they join
  - What are the accrued pension years at date of cause of action and now
  - When did they transfer to the CARE scheme
  - What is the accrued pension under the CARE scheme at date of cause of action and now
  - If the Plaintiff is retired, did they get an ill health pension and if so how much and what tier or is the pension preserved and if so how much
- Defined contribution
  - Which scheme – may need scheme rules
  - What is the level of employer pension contribution and will this change in the future (under the current scheme rules)

## ▪ Roberts v Johnstone [1989]

- Based on the prevailing discount rate and the “additional capital investment”
- Given the negative discount rate in force since 2017, this calculation resulted in a nil award for the capital element of the accommodation claim and therefore was no longer appropriate.

## ▪ Swift v Carpenter [2020]

- The Court of Appeal awarded damages based on the reversionary interest approach (i.e. to derive the present day value of the windfall inheritance to subtract). This is calculated using an assumption that the notional purchaser of the reversionary interest would seek an annual compound return of 5% on their investment.
- In Swift –v- Carpenter, this resulted in an award for accommodation costs of £801,913 (capital shortfall of £900,000 less reversionary interest of £98,087) as follows:

Value / cost of the property now required:	£2,350,000
Value of the existing property :	<u>(£1,450,000)</u>
Capital shortfall:	£900,000
Claimant’s life expectancy :	45.43 years
Value of the reversionary interest:	<u>£98,087</u> ( $£900,000 \times 1.05^{-45.43}$ )
<b>Claim for additional accommodation:</b>	<b><u>£801,913</u></b> ( $£900,000 - £98,087$ )

This is significantly more than under Roberts –v- Johnstone which currently would have resulted in a £nil claim

- The case of Swift –v- Carpenter the judgement did not deal with cases where:
  - the Plaintiff has a short life expectancy; or
  - the Plaintiff is young and but for the cause of action would not have purchased their own accommodation, until later in the future.
  
- How the Swift v Carpenter will apply in the above cases is not clear.
  
- In the absence of further guidance, for young Plaintiff's we frequently prepare accommodation calculations under 3 alternative methodologies for the Court to consider which considers the accommodation but for the cause of action under alternative periods / start dates.

- Periodical Payment Order (PPO)
  - In large cases, even non clinical negligence, now not uncommon
  - Usually not appropriate if there is significant contributory negligence
  - Consideration of what costs are to be included in PPO and what are to be paid as a lump sum
- Collateral agreement on reverse indemnities
  - E.g. payments to be recouped where the Plaintiff may not require care while in hospital
- Personal Injury Discount Rate (PIDR)

# Any questions

