



# A legal toolkit for Amputation Claims

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# 1. Provision of prosthesis

1. Upper or lower limb amputee?
2. The choices:
  - 'Best option'
  - 'Second best'
  - Cosmetic
  - Utility i.e. sports / wet viable prosthesis
3. 'Best option x 2' vs 'Second best' vs 'Cosmetic'





# 1. Provision of prosthesis

## **Pinnington v Crossleigh Construction [2003] EWCA Civ 1684**

- C motorcyclist (33yrs) suffered catastrophic injuries including loss of dominant right arm
- D appeals trial judge's awards on (a) GDs (b) residual earning capacity (c) accommodation (d) provision of prosthesis
- C's expert – Dr Sooriakumaran, recommended 4 different prosthesis



# 1. Provision of prosthesis

## **Pinnington v Crossleigh Construction [2003] EWCA Civ 1684 cont.**

- Theoretically all available on the NHS (possibly not with high definition silicone covers due to cost)
- D contends at trial (a) experts confirm all prosthetics available on NHS (b) realistically C would not spend money if free on the NHS
- C's evidence was that only 1 was available locally, he would spend damages on the recommendations and would chose function over cosmetics
- Judge held utility is a very personal matter so far as prosthesis is concerned
- C would slowly move to use of all 4 prostheses & because not available locally he would purchase them



# 1. Provision of prosthesis

## s.2(4) Law Reform (Personal Injuries) Act 1948

“In an action for damages for personal injuries ... there shall be disregarded, in determining the reasonableness of expenses, the possibility of avoiding those expenses or part of them by taking advantage of the facilities under the National Health Service Act 1977”

**Woodrup v Nichol [1993] PIQR Q104, 114** per Russell LJ,

**Woodrup** was about £1.5k p.a. medical check ups, Judge reduced award by 50% to reflect free availability of check ups on the NHS

“...if on the balance of probabilities, private facilities are not going to be used, for whatever reason, the plaintiff is not entitled to claim for an expense which he is not going to incur.”

**So a finding of fact that C will use facilities on the NHS will trump the law that the use of facilities on the NHS is to be disregarded!**



# 1. Provision of prosthesis

## Pinnington v Crossleigh Construction [2003] EWCA Civ 1684 cont.

- C's evidence – slow to consider private prosthesis because 'cosmetic effect' was low priority & if he had to avail himself of NHS prostheses he would do [Para 46]
- D argued on appeal that **Woodrup** applied therefore multiplier (broadbrush basis) ought to be reduced very significantly [Para 46]
- C argued on appeal evidence that NHS (local centre) could provide was lacking, really speculation & Judge found C would move towards using all 4 prostheses [Para 47]



# 1. Provision of prosthesis

## **Pinnington v Crossleigh Construction [2003] EWCA Civ 1684 cont.**

CA hold at paragraph 49:

- 'matter for the Judge to assess'
- 'not the evidence ... to entitle the Judge to indulge in the kind of speculation that Mr Cotter urged on us.'
- Bearing in mind what the judge was *entitled* to do under the 1948 Act
- 'He would be acting reasonably in acquiring them from a private centre which would provide him properly for his needs in what is very much a very personal affair.'



# 1. Provision of prosthesis

## Pinnington v Crossleigh Construction [2003] EWCA Civ 1684 cont.

### Lessons:

- CA is reluctant to interfere in Trial Judge's findings of fact as to provision of prosthesis
- C's need to be clear about (a) provision on NHS (b) rationale for choice of different prosthesis (c) use of private provider (d) motivation for obtaining / using prosthesis
- D's need to consider (a) NHS provision (b) reasonableness of choice primary prosthesis (c) reasonableness of choice of alternative provision
- **Pinnington** does not resolve the issue of C's contention for prosthesis A (£250K) vs D's contention for prosthesis at (£150K)



# 1. Provision of prosthesis

**Rialas v Mitchell 128 SJ 704** approved in **Sowden v Lodge [2004] EWCA Civ 1370**

- A case concerning the provision of care
- *“What has to be first considered by the court is not whether other treatment is reasonable but whether the treatment claimed for is reasonable.”*
- If D can identify the same prosthesis at cheaper cost will C's claim be unreasonable? Yes, Failure to Mitigate
- If two options both reasonably compensate the Claimant then might the more expensive option be unreasonable? No, Rialas.
- If D can identify a similar prosthesis with similar function but at cheaper cost will C's claim be unreasonable? Discuss



# 1. Provision of prosthesis

## Crofts v Murton [2009] EWHC 3538 (QB)

- C (48 yrs) suffered severe TBI and traumatic amputation of (dominant) (R) arm through the humerus
- C was protected party
- C's wife approached Dorset Orthopaedics who recommended prosthesis at a cost of £24.8K
- The arm gave no useful function
- D contended unreasonable to purchase, was contra-indicated by other treating and medico-legal experts
- Judge held reasonable for C to investigate possibility of functioning prosthesis, reputable source (hospital prosthetics department) recommended Dorset Orthopaedics + C had received some post purchased positive medical advice
- Judge held reasonable for C to incur the costs and allowed in full



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## 2. Prosthetic trials





## 2. Prosthetic trials

### Considerations:-

- Purpose is to establish the benefit (or realise the limitations)
  1. Socket fit – stump / residuum / pain / pressure
  2. Alignment – components fitting together
  3. Motivation – use of NHS prosthesis / client research
- Timing – subject to funding, before Court trial (!)
- Cost / funding – interim payment / contributory negligence



## 2. Prosthetic trials

### Considerations:-

- A range of options
- Meeting other amputees who have realised benefit / using next generation prosthetic limbs
- Purchase with interim payment – private provision
- **Crofts v Murton** powerful authority to support the contention that C will recover the cost of a trial even if contra-indications exist so long as C was acting reasonably



## 2. Prosthetic trials

### Considerations:-

- Duration of trial – relevant to funding / longer the better
- Court expert vs treating Prosthetist – who decides & who is involved?
- Protocol for testing: objective / subjective aims measures
- ‘Independent’ occupational therapist – necessary?
- Review by medical experts



### 3. Future risks

#### Prognosis for Amputees: A check list

- Experts to comment on long term prognosis for both amputated limb and remaining limb (if single amputation)
- Degeneration (osteoarthritis and joint deterioration)
  - Ability to work, use of prosthesis (time limited), equipment (scooter) care needs (increasing over time), etc
  - Effect on the spine – altered leg gait or lack of anatomical weight of arm
- Age (general mobility and decline in function)
  - Ability to transfer in / out of bed – related to equipment and care needs (transport, roll in vehicle later life)



### 3. Future risks

#### **Prognosis for Amputees: A check list**

- Limb pain (if present); management options
- Requirement for future surgery; stump revision, joint replacement or medical review
- Pain medicine – phantom limb pain
- Physical therapies (secondary pain); physiotherapy, acupuncture, massage, OT, etc
- If CRPS (spread / movement)



### 3. Future risks: ability to transfer

#### **Andrews v Gray [2009] HC (Birmingham)**

- C (64yrs) above (L) knee amputee and severe degloving injury to (R) leg
- Multiple heads of loss in issue; earnings, care and accommodation
- Central dispute on
  - (a) whether C would mostly need wheelchair (not prostheses)
  - (b) whether she would be unable to transfer in later life
- Prof Henderson-Slater (prosthetic use to age 80) preferred to Prof Thomas (prosthetic use to age 70)



### 3. Future risks: ability to transfer

#### **Andrews v Gray [2009] HC (Birmingham) cont.**

- C had bad experience in hospital using banana board
- Judge held care package beyond 80 years consisted of:
  - (a) live in carer [to assist with transfers]
  - (b) 14 hrs per day + sleep in carer at night [paid 6 hrs to be on call for 10 hrs] over a 60 week period
  - (c) Cost £98K p.a.
  - (d) But no need for CM as to be provided by established local agency



### 3. Future risks: risk of amputation

#### **Butler v MOJ [2015] EWHC 3384 (QB)**

- C (42yrs) suffers injury to right foot
- Fractured (R) 5<sup>th</sup> metatarsal + cuboid bone
- Fusion operation (5 yrs pre-accident) and (again) post accident
- Fractures partially united but significant neuropathic pain – could not weight bear
- Options (a) leave alone (b) remove metalwork (c) amputate below knee
- C developed CRPS in (R) foot
- Experts agreed pain due to retained metalwork, ongoing non-union & bio-mechanical imbalance



### 3. Future risks: risk of amputation

#### **Butler v MOJ [2015] EWHC 3384 (QB) cont.**

- C decided not to undergo amputation (at present)
- Experts agreed 25% chance of future amputation
- Experts agreed amputation would give 70% chance of improvement in symptoms
- Experts agreed 30% chance of a worse outcome post amputation i.e. a 7.5% (25% x 30%) risk of deterioration by reason of CRPS, phantom limb pain or failure of the stump to heal.
- D argued worse than expected outcome is not within ambit of PDs or limit time to return to 2-3 yrs



### 3. Future risks: risk of amputation

#### 32A Supreme Court Act 1981 (Provisional Damages)

- (1) This section applies to an action for damages for personal injuries in which there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.
1. Has C suffered personal injury?
  2. Does C face a chance or risk?
  3. Does that risk involve a serious disease or suffer a serious deterioration in his/her mental or physical condition?
  4. Should the Court exercise its discretion?
  5. An order for PD must specify the precise nature of the disease or deterioration which must occur before C can seek further recourse to the Court



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### 3. Future risks: risk of amputation

**What would constitute a serious deterioration?**





### 3. Future risks: risk of amputation

#### Provisional Damages cont.

- Risk must be measurable rather than fanciful
- Fall between a risk which is 'de minimus' and 'a probability'
- Risk interacts with seriousness of condition
- ✧ 5% risk of pleural thickening insufficient to trigger PD award
- ✧ 2-3% risk of mesothelioma was a risk sufficiently serious to merit PD award



### 3. Future risks: risk of amputation

#### **Chewings v Williams [2009] EWCA Civ 2490 (QB)**

- C suffered serious injuries to (R) leg
- Possibility of fusion operation which if unsuccessful could lead to a real risk amputation
- D evidence was fusion surgery was unlikely and amputation overall was less than 1%
- C evidence was C would probably go on to fusion surgery and that held a 25% amputation risk
- D contended risk was remote because very unlikely C would undergo surgery so should not make PD award
- Judge held 2% risk overall and awarded PD



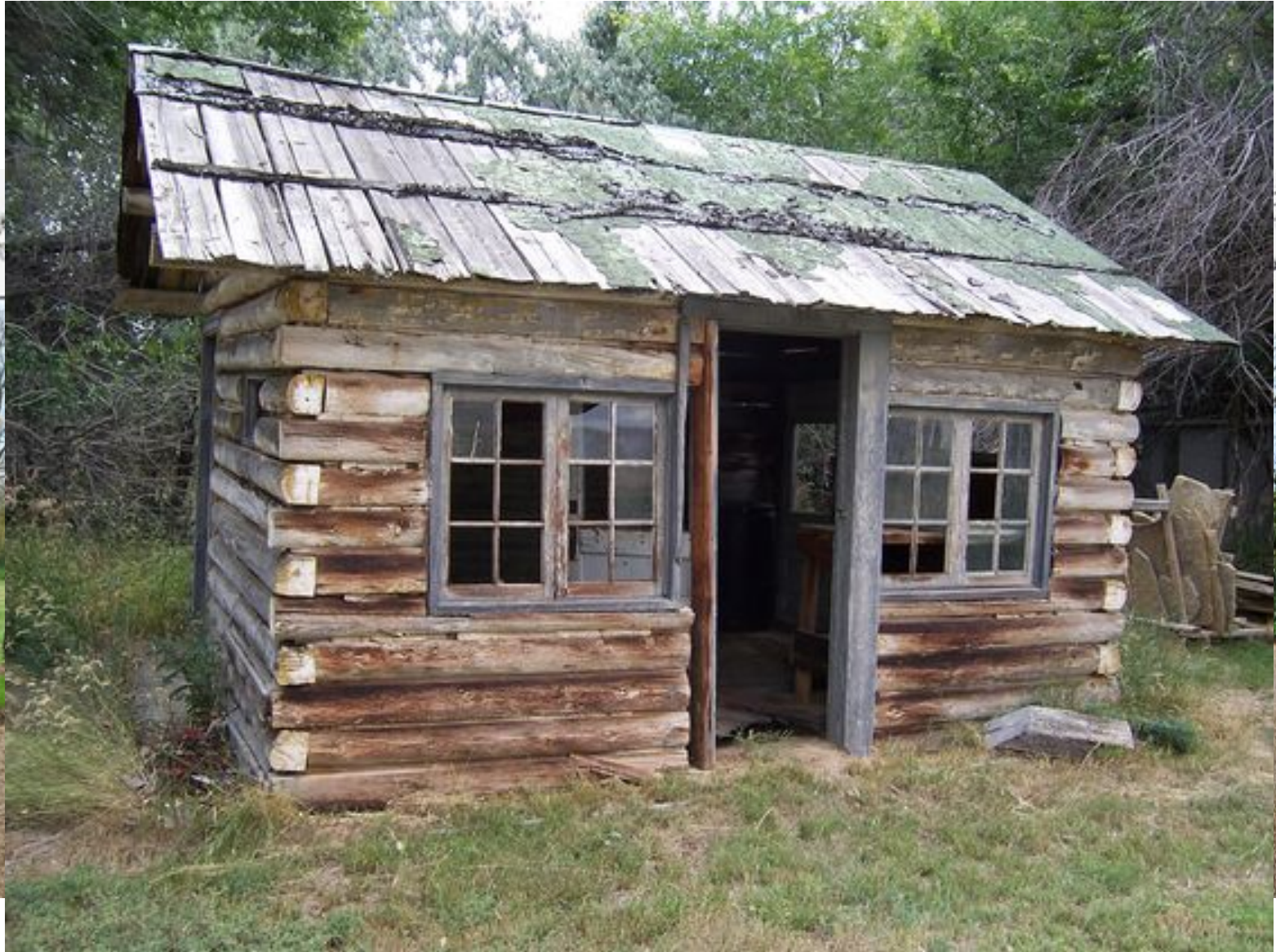
### 3. Future risks: risk of amputation

#### Butler v MOJ [2015] EWHC 3384 (QB) cont.

○ Judge held:

- (1) Risk of amputation per se was **not** a 'serious deterioration' because there was a 70% chance of improvement [Para 56]
- (2) BUT if C did undergo surgery and amputation then risk of CRPS, etc, developing leading to being wheelchair bound or less mobile **would** be a serious deterioration hence would make an award for 7.5% (25% x 30%) risk of developing (a) CRPS or (b) phantom limb pain or (c) failure of stump to heal post amputation [Para 60]
- (3) Judge applied time limit to age of 60<sup>th</sup> birthday by which time C will have resigned himself to current situation or decided to proceed with amputation [Para 61]

## 8: Roberts v Johnstone: where now?



## 4: Roberts v Johnstone

- Sir Edward Coke in The Institutes of the Laws of England, 1628:

**"For a man's house is his castle, et domus sua cuique est tutissimum refugium [and each man's home is his safest refuge]."**

- Important head of damage: home is for eating, sleeping, leisure, family life – if injuries prevent existing property from being used for those functions, then a real loss

## 4: Roberts v Johnstone

### ■ George v Pinnock [1973] 1 WLR 118

- No difference between loss of use of capital income and annual mortgage interest
- Actual vs notional cost of borrowing

### ■ Roberts v Johnstone [1989] QB 878

- Cerebral Palsy case
- 1. C had already purchased bungalow
- 2. PSLA was sufficient to cover cost of accommodation
- 3. Generous IP funded the payment

IN BOTH CASES INSURERS HAD FUNDED THROUGH INTERIM



## 4: Roberts v Johnstone

### ■ IMPORTANT:

In both cases, the prime concerns of the Court of Appeal were:

- i. The Claimant would own the property, so no loss in holding property;
- ii. If defendant had to fund the capital cost, there would be a windfall for the family.

■ Difference was merely whether the rate should be borrowing rate or rate of return on investment. **R v. J** decided the latter.

■ **Wells v Wells** – the rate of loss should be determined by the DR, subsequently 2.5%



## 4: Roberts v Johnstone

### ■ Claimant's Arguments/Problems: -

1. Before discount rate change.
  - Always less than capital sum need to purchase property
  - Increase in house prices especially South East made more expensive properties hard to fund
  - Shortened life expectancy cases were particularly difficult, especially where children concerned.
  - Purpose of compensation obfuscated if C invests loss of earnings, care etc to purchase property
2. After discount rate change, there can be no award at all. Artificial and brings law into disrepute.

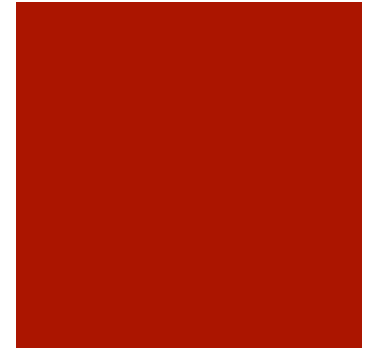
## 4: JR v Sheffield Teaching Hospitals NHS Trust



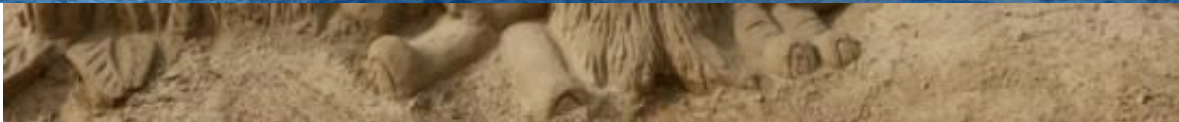
- JR had significant accommodation needs arising from cerebral palsy.
- C argued that 2.5% rate was arbitrary and that to award no sum would require him to use capitalised sums from other heads.
- Williams Davis J. rejected C's arguments.
- Bound by CA. On the evidence and applying discount rate there was no loss.
- No evidence before the court as to alternative methods of evaluating the cost of purchase

## 4: Roberts v Johnstone

### ■ FUTURE OPTIONS



1. Lord Chancellor's announcement has lead most commentators to predict a 0% - 1% Discount Rate.
2. **R v. J** as is.
3. **R v J** but with notional costs of mortgage interest replacing the notional loss of investment
4. C takes out mortgage with PPO for interest
5. Rental costs (D buying and leasing back to claimant or private sector rental)
6. D funds deposit on the property with/without a charge
7. D funds whole purchase price on the property with/without a charge



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