NINESTJOHNSTREET
LARGE LOSS PERSONAL INJURY

The Discount Rate

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22nd June 2017

1: First Principles

- The full compensation principle
- To put C back into the same position s/he would have been but for the accident (in so far as money is able to)
- Problem: How to calculate future losses?
- (1) The effect of inflation
- (2) Advantage of investing lump sum early
- Discount rate is net rate of return on lump sum
- **The rate of return is set against** Index Linked Government Securities (ILGS) ('index linked gilts')

1: First Principles

- The Law Commission report 1994 – ILGS yields as benchmark for DR
- The Damages Act 1996 – Lord Chancellor to set the DR (but **no reference to ILGS)**
- Wells v Wells [1998] HL – DR 3% by reference to ILGS
- Previous Lord Chancellor's Decision 2001 (2.5%) – supported by the Courts
- Helmot v Simon [2010] [CA in Guernsey] -1.5% for earnings and 0.5% for other future losses
- APIL JR 2011 – delay
- ABI JR 2017 – concern

Discount rate: statement placed by The Rt Hon Elizabeth Truss MP, Lord Chancellor, in the libraries of the Houses of Parliament on 27 February 2017

…

8. The principles in *Wells v Wells* lead me to base the discount rate on the investment portfolio that offers the least risk to investors in protecting an award of damages against inflation and against market risk. **I take the view that a portfolio that contains 100% index-linked gilts (ILGs) best meets this criterion at the current time.**

…

9… the case has been made by a number of respondents to the consultation exercises that it might be more appropriate and realistic to use **a 'mixed portfolio' approach** (in which other securities feature). **I acknowledge that those arguments have some merit. However, I am not persuaded by them.** I consider that a faithful application of the principles in *Wells v Wells* leads to the 100% ILGs approach as **the best way**,

…

13. To weight long term stocks in a simple and transparent way, I have taken a simple average of gross real redemption yields across all ILGs and, in line with *Wells v Wells*, **have excluded stocks with less than five years to maturity.**

…

14. Regarding **the period over which the real redemption yield is averaged**, I have followed the majority view from *Wells v Wells* and the practice adopted by Lord Irvine in 2001, **namely to average over the three years to a convenient date**

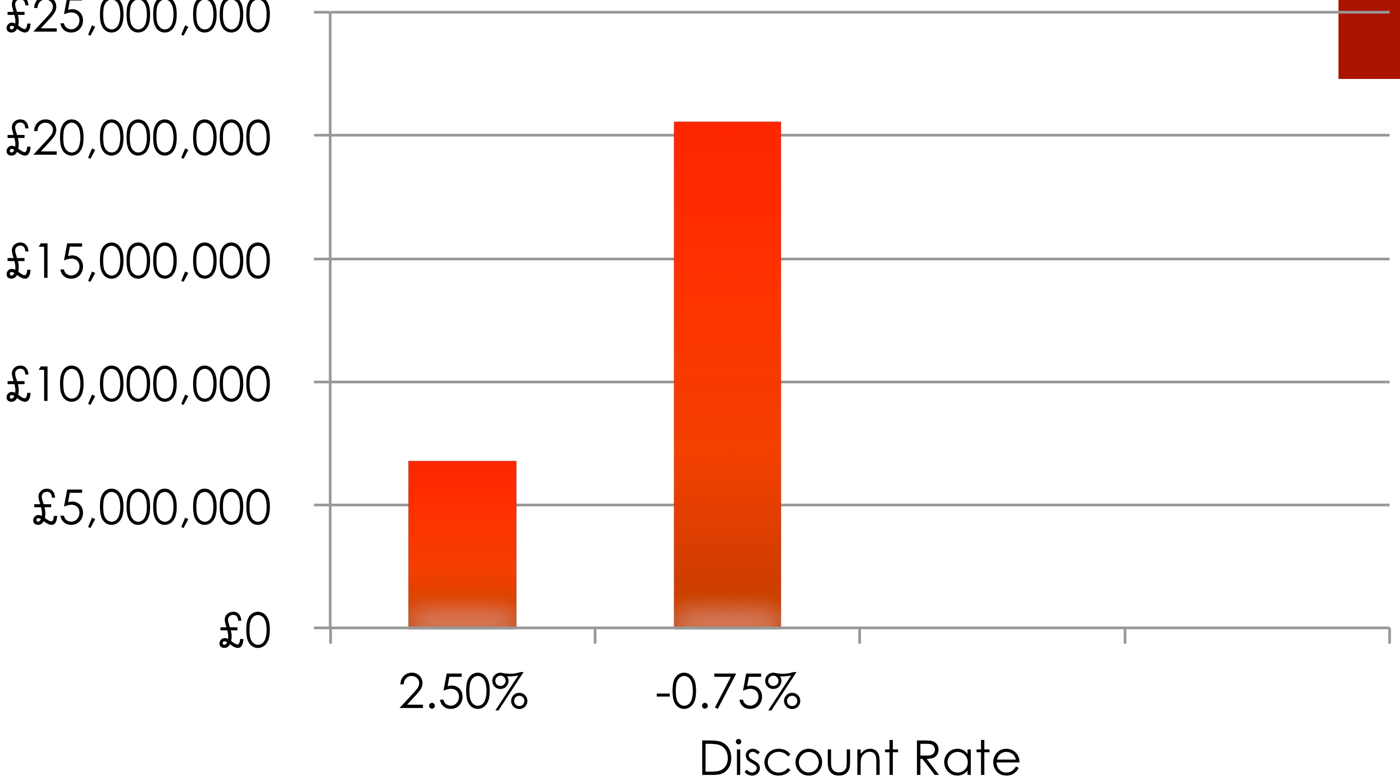
…

15. The three year simple average gross real redemption yield on ILGs is minus 0.83% as of 30 December 2016 excluding ILGs with less than 5 years to maturity…**I am persuaded that rounding to the nearest 0.25% points is adequate**. This would lead to a discount rate of minus 0.75%.

2: -0.75% - the decision

- Liz Truss statements of reasons 27.2.17
- Change effective as of 20.3.17
- Rejection of mixed portfolio approach
- Only **ILGs** of 5 years + considered (previous 2001 decision incorporated all **ILGs**)
- 3 year average yield rate is used (dropped over last 3 years)
- New -0.75% column

2: (-0.75%) the impact



- **16 year old girl requiring lifelong care at £200K p.a.**
- **2.5% multiplier is 33.73 x £200K = £6.75M**
- **-0.75% multiplier is 102.65 x £200k = £20.5M (203% increase)**
- **(Multipliers from Ogden Table 2)**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ABI and Chancellor of the Exchequer – Joint Statement 28.8.17

"The government will progress **urgently** with a consultation on the framework for setting future rates, and bring forward any necessary legislation at an **early stage**.

"The industry will contribute fully to the upcoming consultation, and the government will carefully consider all evidence and arguments submitted."

Phillip Hammond Budget Speech 8.3.17

We will protect the NHS from the effects of the changed personal injury discount rate, and have set aside £5.9 billion across the forecast period to do so.

Elizabeth Truss MP in the House of Commons, Hansard 7.3.17, Volume 622

I have spoken to my right hon. Friend the Health Secretary to discuss the implications for the NHS. As I said, under legislation the Lord Chancellor must only consider the impact on the victim. **I do not think the procedure works in the right way**, **which is why I will shortly bring forward a consultation on a better way to set the discount rate.**

CIVIL LIABILITY BILL – QUEENS SPEECH 21.6.17

"Legislation will also be introduced to […] help <u>reduce motor insurance premiums</u>."

The purpose of the Bill is to:

Ensure there is a fair, transparent and **<u>proportionate system of compensation in place for damages</u>** paid to genuinely injured personal injury claimants.

The main benefits of the Bill would be:

Tackling the continuing high number and cost of whiplash claims to put money back in the pockets of motorists through reduced insurance costs.

<u>Ensuring that full and fair compensation is paid to genuinely injured claimants</u>.

The main elements of the Bill are:

whiplash claims by banning offers to settle claims without the support of medical evidence and introducing a new fixed tariff of compensation for whiplash injuries with a duration of up to two years.

….

3: -0.75% - what now?

- A new consultation – 30.3.17 – 6.5.17 (!)

1. What principles should guide how the rate is set?
2. How often should the rate be set?
3. Who should set the discount rate?
4. Is sufficient use being made of PPOs?

- MOJ has no preferred view – but do nothing approach is linked heavily with ‘over compensation’ and ‘higher costs’ language
- Difficult to predict – swing back upwards from -0.75% & quicker than last consultation
- ‘A better way’ – bespoke government CPI linked security?
- Insurer funded securities with guaranteed rate of return – 3% - 5%?

3: -0.75% - what now?

- Crystal ball gazing
- It is not a ‘discount’ rate
- No-one thinks it will stay at -0.75% = ‘an interim discount rate’
- 1% is a compromise figure discussed by commentators
- A mixed portfolio of investment in the future?
- Change of approach to Wells v Wells?
- Parliament can overturn Wells v Wells
- Timescales difficult to predict: 12-18 months
- Impact of Brexit / Election on legislative process

4: -0.75% - strategy and tactics

- A lot depends on the stage of the litigation
- If cases are listed for trial or likely to be listed for trial within next 12 months it is more difficult
- Defendants obviously reluctant to offer -0.75%
- Defendants will delay hoping for a better rate
- Claimants will be keen to resolve cases now at -0.75%
- DR is not the only show in town – multiplicands / care regimes are still large parts of the case
- **Some Courts have indicated a reluctance to approve cases at less than -0.75% (but anecdotal evidence of 1% approvals)**

4: -0.75% - strategy and tactics

- Part 36 frenzy is over (Ds accepting / Cs withdrawing)
- BUT problems continue for Ds particularly where they have made a ‘good’ offer on a ‘difficult’ cases at 2.5%

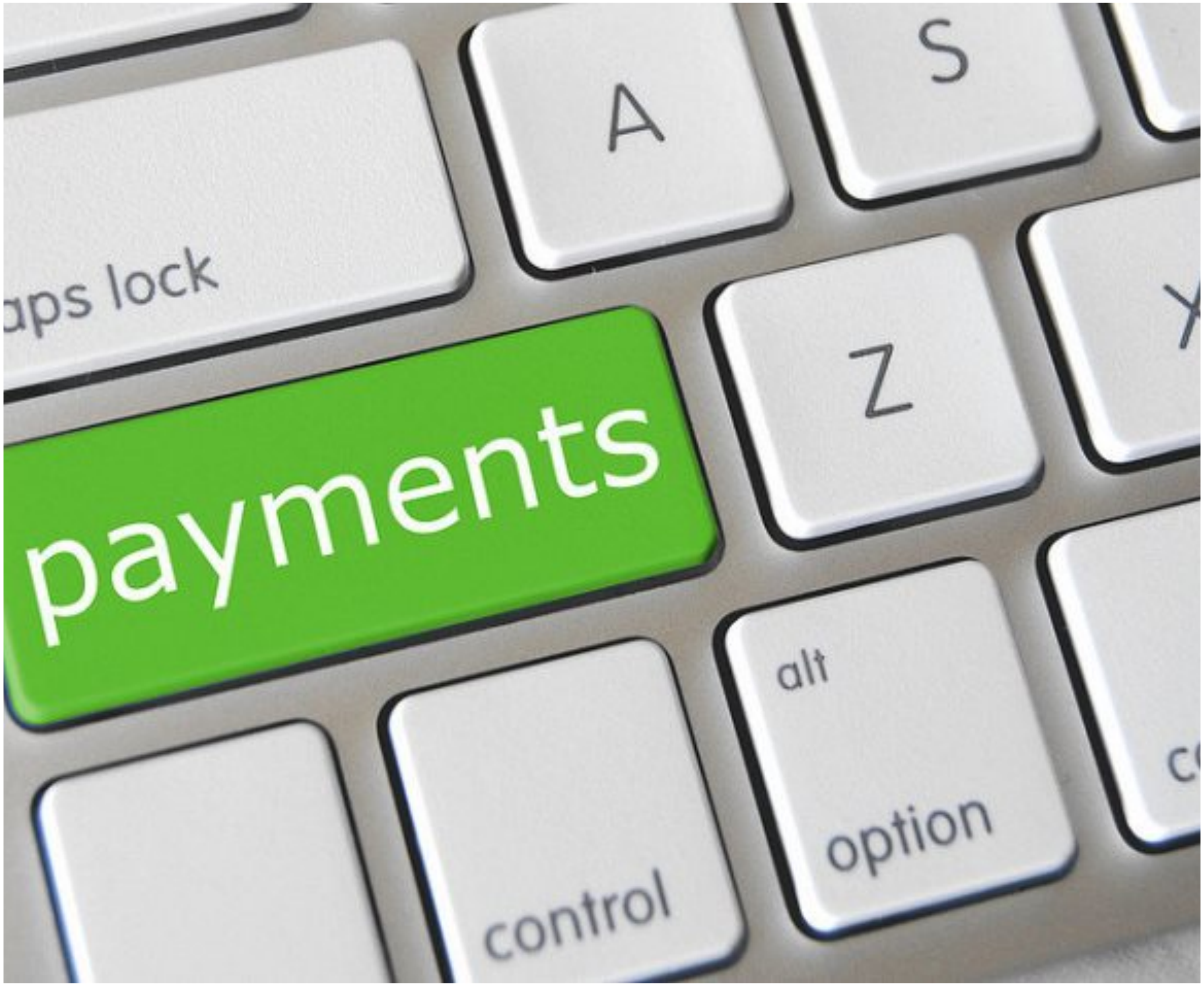
1. Court is unlikely to accept sticking on original damages offer
2. Ds might uprate the offer in accordance with -0.75% & covering letter to say that will invite Court to hold logical extension of 2.5% offer

- New offers based on multiplicands only
- Counter Schedules – just using multiplicands
- Costs budget revisions (material change of circumstances)
- Costs are more ‘proportionate’ now
- Check your insurance limits – costs will rise – affects C lawyers

4: -0.75% - strategy and tactics

- Discounts for early receipts are now enhancements for early receipts – is that fair or just?
- Table A – D – 'disabled' and 'non disabled' discounts now become more important and contentious
- Pension Losses now become even more valuable + increasingly complex calculations – costs budget for pension expert, early disclosure of pay records + provisional report
- Life expectancy becomes very important: M for 65 years = 83.85 and 70 years = 92.16. Life expectancy evidence now proportionate. Likely to see more applications by Cs and Ds to persuade the Court of its relevance and proportionality

5: -0.75% - PPOs



5: -0.75% - PPOs

- PPOs more attractive to Defendants
- Court has power to order PPO, CPR 41.4
- **No one knows how receptive court will be to argument by D of ‘over compensation’**
- Court might not want to approve w/o PPO where life expectancy an issue
- CPR PD 41B 1(2)(b) the nature of any financial advice received by the claimant
- Life expectancy cases favour PPOs to avoid under or over compensation
- -0.75% cases is good for Cs with contributory negligence discounts (who may need more flexibility and have to take more financial risks)

5: -0.75% - PPOs

- Less flexibility (but was always the case)
- Funding property purchase if no R v J claim is more problematic
- Do the maths – does it work or not?
- Is it still better (more certain) for Claimants with significant long term care needs?
- Recent trends – no-one wants them save for where life expectancy is an issue

6: -0.75% - Interim Payments

- Capitalised accommodation costs are normally included in Stage 1 Test in Cobham v Eeles (this therefore reduces available sum to C) – harder for Claimants

- But C may reject notion of 'protecting' PPO at -0.75% in Eeles (Stage 2 Test) although C still need to convince of need

- In turn this may tie the hand of the trial judge – should that be permitted especially if discount rate is 'interim rate'

- C's non-PPO future losses will be much higher

- Serious injuries for life PPOs remain valid – Judges will still want to preserve

- Child cases may be different – if needs property now but trial 10 years off – more willing to capitilise future accommodation to allow in adaptations (for example)

7: -0.75% - Early Receipt / Repeat costs

- Ogden Table 27 was always less than 1, not anymore
- **There is no longer a discount – justification is, it is going to cost more**
- **Technology – Is it getting cheaper?**

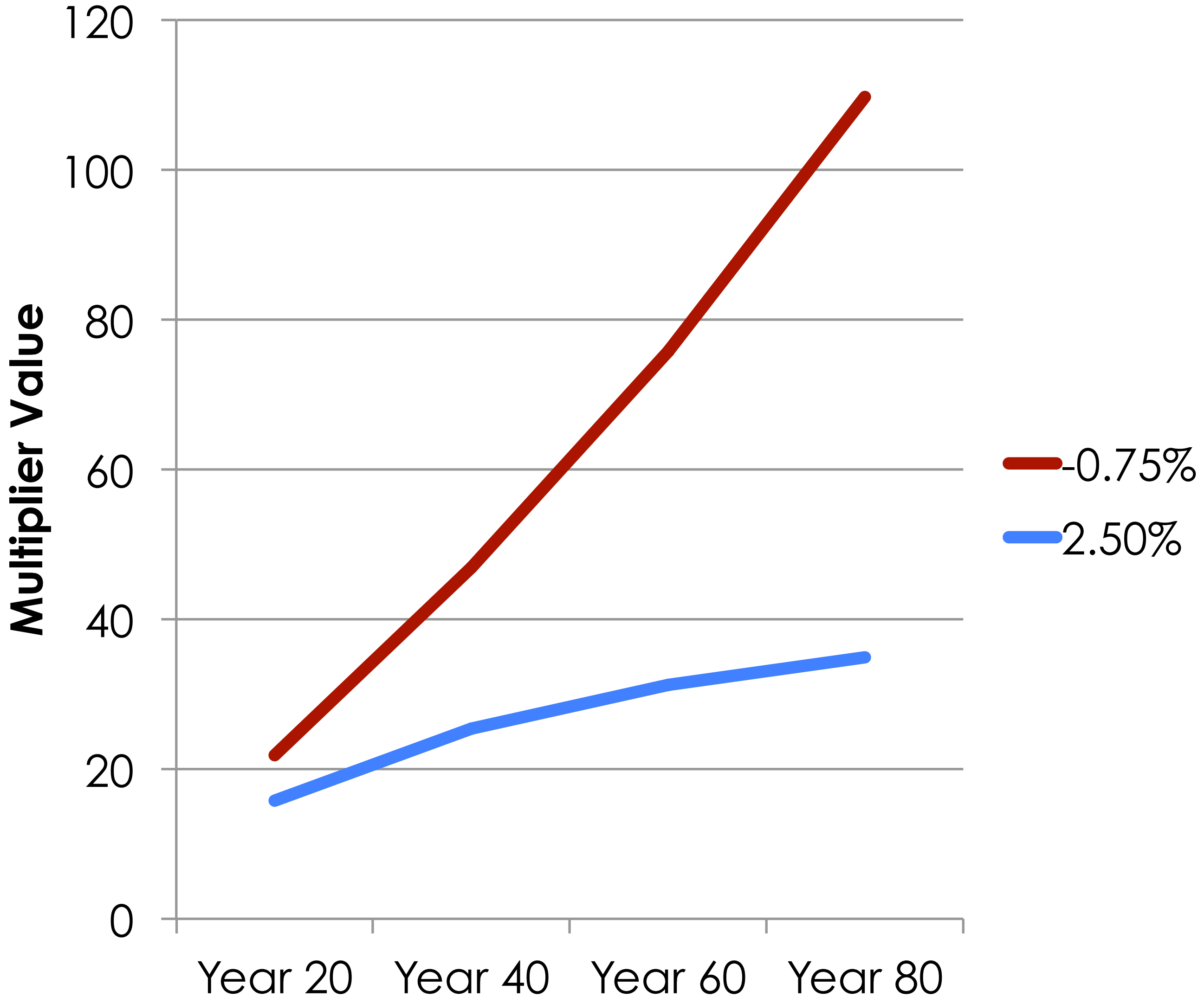
7: -0.75% - Early Receipt (OT 27)

	Discount Rate	
Term	**- 0.75 %**	**2.5 %**
5 years	1.0384	0.8839
10 years	1.0782	0.7812
15 years	1.1195	0.6905
20 years	1.1625	0.6103

It is going to be more expensive to purchase surgery or equipment in 20 years time than in 5 years time or tomorrow – or is it?

Confused.com

7: -0.75% - Repeat Costs



The impact of the -0.75% discount rate

Repeat costs of £1,000 over 80 years

2.5% = £34,880

-0.75% = £109,750

214% increase or 3.14 times more expensive

7: -0.75% - Repeat costs

- Transtibial amputation prosthetic costs of £250K every 5 years
- £50K every year
- C is 25 year old man
- 2.5% = 30.92 x £50K = £1,546,000
- -0.75% = 79.99 x £50K = £3,999,500
- 159% increase in costs

7: -0.75% - Repeat costs

- Differences between using OT 1 and OT 28 are more important as OT 28 does not include life expectancy so:
- 25 year old man will live for another 62.9 year (assume 63 years)
- Ogden Table 28 for 63 years multiplier is 80.61
- 80.61 x £50,000 is £4,030,500 which is £31K more than using OT 1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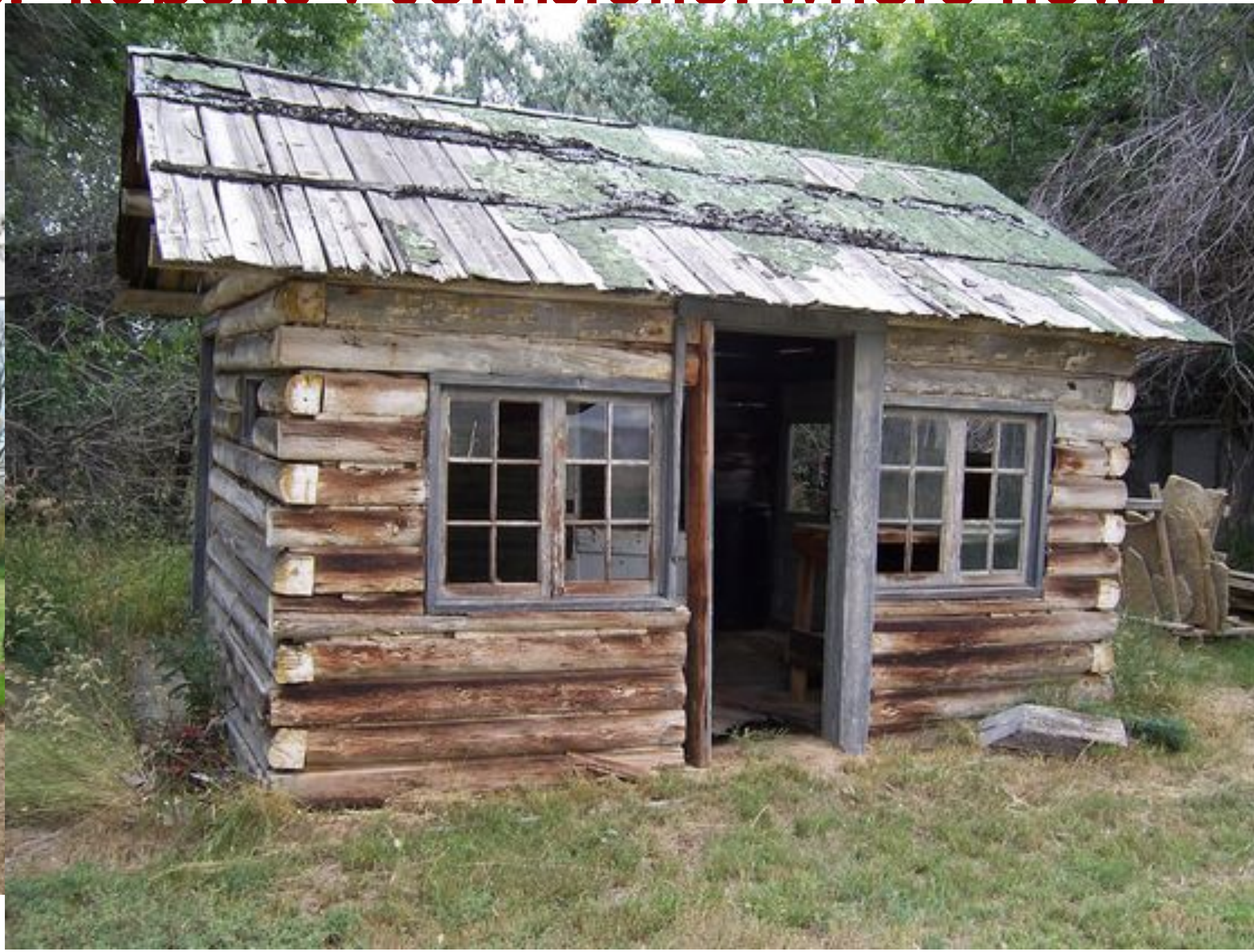
8: Roberts v Johnstone: where now?



8: 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

8: 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

8: 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%

8: Roberts v Johnstone

- <u>Claimant's Arguments/Problems</u>: -

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.

8: 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 capitilised 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

8: Roberts v Johnstone

- **FUTURE LEGAL OPTIONS**

1. R v. J but with notional costs of mortgage interest replacing the notional loss of investment
2. C takes out mortgage with PPO for interest
3. Rental costs (D buying and leasing back to claimant or private sector rental)
4. D funds deposit on the property with/without a charge
5. D funds whole purchase price on the property with/without a charge

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