MEDICAL NEGLIGENCE UPDATE

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Topics to Discuss

- Expert Meetings and hot tubbing in clinical negligence claims
- Recent cases on reasonableness of damages
- Periodical Payment Orders/Agreements
- Discount rate changes
- How that has affected Housing Claims
- Montgomery and consent

Expert Evidence

- Expert evidence is vital in the clinical negligence claim
- The fundamental characteristic of expert evidence is that it is **opinion evidence**
- The role of the expert witness is to assist the court in reaching its decision with technical analysis and opinion inferred from factual evidence
- The Expert witness is accorded a special role not given to other witnesses
- Consider
  - Expert Meetings, Single Joint Experts and Hot tubbing

The Ikarian Reefer

- *National Justice Compania Naveira SA v Prudential Assurance Company Limited* [1993] 2 Lloyd's Rep 68 set out the duties and responsibilities of expert witnesses in civil cases
  - Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of of litigation
  - An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise.
  - An expert witness should never assume the role of an advocate

Expert Evidence

- **Kennedy v Cordia (Services) LLP 2016 UKSC 6**
- *" As with judicial or other opinions, what carries weight is the reasoning, not the conclusion"*
- Supreme Court- an expert must explain the basis of his or her evidence, a mere assertion "bare *ipse dixit*" (bare assertion resting on the authority of an individual) carries little weight- it is worthless

Single Joint Expert

- In England the court can direct that evidence on an issue is to be given by a single joint expert or the parties can agree to instruct a single joint expert
- A single joint expert can be instructed in Scotland
  - Care should be taken in the instruction
  - Theoretically a court could order this in Scotland
- There should be joint instruction
- A single joint expert is not permitted to have discussions with one party in the absence of the other party

Meetings of Experts

- Both the Sheriff Court rules and Court of Session rules provide for case management by the court
  - Chapter 42A in the Court of Session
  - Chapter 36A in the Sheriff Court
- Increasingly the parties are agreeing that joint meetings of experts is useful
- Many of the judges are either actively encouraging or ordaining parties to arrange joint meetings of experts

Meetings of Experts

- You require to select appropriate experts to meet
  - Same or related disciplines
- The expert reports require to have been finalised and exchanged before the meeting
  - You should have met with your expert
- If possible factual statements should be obtained from treating doctors and any doctor under attack
- The experts prepare a report following the meeting for the court

Meetings of experts

- Purpose of the meeting
  - Encourage the exchange of early and full information about the expert issues involved in the prospective claim;
  - Enable the parties to avoid or reduce the scope of litigation by agreeing the whole or part of an expert issue before proceedings are started; and
  - Support the efficient management of proceedings where litigation cannot be avoided
- The purpose of the meeting is not for the experts to settle the case

Purpose of the Meeting

- The purpose of the discussion between experts should be, wherever possible to:
  - Identify and discuss the expert issues in the proceedings;
  - Reach agreed opinions on those issues, and, if that is not possible narrow the issues;
  - Identify those issues on which they agree and disagree and summarise their reasons for disagreement on any issue; and
  - Identify what action, if any, may be taken to resolve any of the outstanding issues between the parties

Meetings of experts

- Arrangements for discussion should be proportionate to the value of the case
  - Telephone discussion or exchange of letters can suffice
- Practicalities may dictate that discussions are by telephone or video conference
- An agenda should be produced for the meeting
- The primary responsibility for the agenda usually lies with the claimant’s Solicitor
- Those instructing experts should not tell them not to reach agreement

Meeting of Experts

- The agenda should indicate what has been agreed and summarise concisely matters that are in dispute
- The agenda should focus on questions intended to clarify the areas of agreement or disagreement between the parties relevant to the experts who are meeting
- Questions which seek to cross-examine the witness defeat the purpose of the meeting and should be avoided
- Parties require to agree the questions in the agenda
- The content of the discussions should not be referred to at proof unless parties agree

Presence of Legal Team

- The general view in England if that the presence of lawyers might inhibit the experts from debating their opinion on the issues in a full and frank way
- In England the protocol states that the parties lawyers may only be present at discussions between the experts if all parties agree or the court orders this.
- If lawyers do attend they should not normally intervene except to answer questions put to them by the experts or to advise about the law
- It is not for the parties to tell experts what opinions they should hold

Joint Statement

- At the conclusion of any discussion between experts, a joint statement should be prepared setting out:
  - The issues that have been agreed and the basis of that agreement;
  - The issues that have not been agreed and the basis of the disagreement;
  - Any further issues that have arisen that were not included in the original agenda for discussion; and
  - A record of further action, if any, to be taken or recommended, including if appropriate a further discussion between experts
  - Any change in an experts opinion should be recorded

Joint Statement

- The Joint Statement is prepared by one expert after the meeting is finished
- It should then be sent to the other expert for correction and signing
- This should be the minutes of what was agreed at the meeting and not what an expert or lawyer things should have happened
- The experts should sign off the items agreed
- The Joint Statement should contain a brief restatement that the Experts recognise their duties and obligations as experts

Hot Tubbing

- “Hot tubbing” is legal slang for concurrent expert evidence
- This involves experts from the same discipline, or sometimes more than one discipline giving evidence at the same time and in each other’s presence
- The experts are sworn together, and sit in front of the judge, who puts the same question to each expert in turn
- The judge chairs a debate

Hot Tubbing

- Lord Justice Jackson reviewed hot tubbing in a lecture to the Commercial Bar Association of Victoria on 29 June 2016
- He was a supporter and argued it would make judges prepare more thoroughly for a case and reduce the time of expert witnesses in the witness box and thereby reduce costs
- It may not be appropriate in large cases with a number of experts
  - Harrison and others v Shepherd Homes Ltd and others [2011] EWHC 1811
  - Streetmap.EU Ltd v Google Inc [2016] EWHV 253 (Ch)

Hot tubbing

- It is used extensively in Australia although the courts prefer the term ‘concurrent evidence’
- This is a methodical approach designed to isolate the areas of disagreement between the parties
  - Expert reports must be prepared and exchanged
  - The experts then meet and draft a joint report with a summary of all areas of agreement and disagreement
  - Using the joint report as a guide the parties prepare an agenda to guide the giving of expert evidence concurrently at the court hearing

Hot Tubbing

- At the hearing the experts are sworn in and give evidence together
- The giving of evidence becomes akin to a discussion
- The judge and lawyers put questions to the experts and the experts can question each other
- The judge controls and manages the process so that it remains focused and structured

Hot Tubbing

- Pros of hot tubbing
  - It encourages experts to talk to each other before and during the case and more readily identifies the issues in dispute
  - It is less confrontational than the traditional adversarial approach of testing expert evidence
  - Experts typically feel more comfortable
  - This should allow issues to be identified and resolve cases more quickly
- However success is depends on preparation by parties and the ability of the judge hearing the case

Reasonableness of damages

- Whether or not a head of damages is recoverable, and if so, the extent of the loss recoverable, the test is “reasonableness”
- The claimant is entitled to damages to meet his “reasonable needs” or “reasonable requirements”
- There may be a range of “reasonable options” and the item sought does not require to be the cheapest option if its reasonable
- There have been some interesting cases in England where they have considered the question of “reasonableness”

Reasonableness

- The aim of an award of damages is to provide compensation
- The sum should put the part injured as nearly as possible in the same position had he not sustained the wrong
- The level must not result in injustice to the defender
- The level must not be out of accord with what society as a whole would perceive as reasonable *Heil v Rankin*
- No justification for imposing artificial caps on the multiplier or judicial scaling down

Reasonableness

- The logical way to approach the question is to start with the nature and extent of the claimant's needs
- Then consider whether what is suggested is reasonable having regard to those needs
- Care should be taken to consider whether a claimant will actually use what is sought
- Relevant circumstances include a requirement for proportionality as between the cost to the defendant of any individual item and the extent of the benefit which would be derived by the claimant from that item

Wagner v Thomas Grant and Others

- Claimant sustained below knee amputation and had a NHS prosthesis
- The claimant's expert suggested a trial of a BiOM prosthesis and four prosthetic limbs
- The defenders expert did not recommend water limbs and gave a reason for that and did not favour the BiOM system
- Scottish case -Lord Uist accepted the defenders expert and was not persuaded that what was proposed by the pursuer's expert was 'reasonably necessary'

Leo Whiten v St George's Healthcare NHS Trust *[2011] EWHC 2066 (QB)*

- It was said that the claimant was entitled to damages to meet his reasonable needs arising from his injuries.
- In considering what is "reasonable" the court will have regard to all the relevant circumstances, including the requirements of proportionality as between the cost to the defendant of any individual item and the extent of the benefit which would be derived by the claimant from that item.
- In *Whiten* there was a claim for aquatic physiotherapy which is essentially hydrotherapy. The claimant's expert report stated the claimant would 'benefit' from having such therapy.

Leo Whiten v St George's Healthcare NHS Trust

- The defendant's experts stated that although it was pleasurable no progress could be made by using the therapy.
- It was useful in patient's post -surgery but since the movements were not replicable on dry land there was no lasting benefit.
- the claimant had not established a clinical need which cannot be met with physiotherapy exercises performed in an ordinary swimming pool with suitably trained carers and occasionally his treating physiotherapist
- *Whilst it might be convenient for the claimant to have a pool at his new home, there is no evidence of a real need for the facility*"

Leo Whiten v St George's Healthcare NHS Trust 2011

- In *Whiten* there was also a claim for "hippotherapy" which involved attending riding sessions
- An award was made for this as it was though the activities had a therapeutic benefit
- There was a claim for representation at a Disability Needs Tribunal which was allowed
- A claim for HANDLE therapy was not as there was no scientific or medical evidence to support this therapy

Whiten v St George's Healthcare NHS Trust

- The case also considered the issue of environmental control systems
- It was considered it was unlikely the claimant would ever have the requisite level of cognitive ability to use this
- The court only awarded for a My Tobii system
- The case is also useful in its consideration of holiday costs
- The court restricted the travel cost as it was thought unlikely the claimant would fly after age 12
  - Holiday home purchase in France not allowed

Ellison v University Hospitals of Morecambe BAY NHS Foundation Trust *[2015] EWHC 366 (QB)*

- Claimant child with CP. The court considered the cost of hydrotherapy pool
- In this case the defendants argued that the court should only award the cost of installing and maintaining a hydrotherapy pool if three conditions were satisfied. (i) it was necessary as part of the therapeutic treatment of the claimant, (ii) there are no other reasonable alternatives available, (iii) the costs are proportionate to the benefit to be obtained. The claimant produced a day in the life video demonstrating the effect of the hydrotherapy. This was pivotal to the decision
- The cost of in home hydrotherapy was awarded as it was said the cost was proportionate to the need given the extent and frequency of the pain and since there were no other means which would provide the same or substantially similar relief from the pain suffered

Robshaw v United Lincolnshire Hospitals NHS Trust [2015] EWHC 923 (QB)

- CP case in which liability was admitted but virtually all elements of future loss was
- Total final award was in the region of 14.6m
- There was a claim for a home pool 7m x 4m
- The court allowed a home pool 5m x 3m
- The expert for the claimant visited local leisure facilities and took photos to establish they were not suitable
- The claimant came from a family of campers and they were able to obtain £96,000 plus annual refurbishment costs for a Kon Tiki Motorhome

Manna (A Child) v Central Manchester University Hospitals NHS Foundation Trust *[2017] EWCA Civ 12*

- The claimant was able to claim the cost of obtaining and adapting two properties
- The parents were separated and the claimant lived with his mother and partner in one property
- The second property was where he would live with his father with carers
- There was no reported cases where such an award had been made
- It was said by the court it was a generous award and intensely fact-dependant

THE DISCOUNT RATE

- ***Hodgson v Trapp [1989] AC 807***
- Essentially what the court has to do is calculate as best it can the sum of money which will on the one hand be adequate, by its capital and income, to provide annually for the injured person a sum equal to his estimated annual loss over the whole period during which that loss is likely to continue,
- but which, on the other hand, will not, at the end of that period, leave him in a better financial position than he would have been apart from the accident.
- Hence the conventional approach is to assess the amount notionally required to be laid out in the purchase of an annuity which will provide an annual amount needed for the whole period of loss.

Discount Rate

- The discount rate forms part of the calculation which converts an assumed future stream of income into a present sum
- Until the late 1990's the courts applied a discount rate of 4.5% (net of tax) based on the assumed return from a mixed portfolio of investments
- In 1999 the House of Lords considered how multipliers for future loss should be calculated (*Wells v Wells*)
- Concluded it should be calculated on the basis of a rate of return available on ILGS

Discount Rate

- By the time of the judgement in *Wells v Wells* the Lord Chancellor had been given the power to set the discount rate and in June 2001 the rate was set at 2.5%
- The rate was based on the three-year average yield on ILGS up to June 2001
- The Lord Chancellor had said it was open to the courts to adopt a different discount rate
  - There were attempts to try to do so unsuccessfully
- There were repeated calls to review the discount rate following a steady decline in ILGS

Discount Rate

- On 27 February 2017 the Lord Chancellor announced the new rate of -0.75%
- Scottish Ministers laid an Order on 27 March to change the discount rate in Scotland to minus 0.75%. The change came into force on 28 March.
- It was also said at that time that the government would launch a consultation to consider whether there was a better or fairer framework for claimants and defendants
- The rate set was based on a three year average of real returns on Index Linked Gilts
- It was recognised at the time there would be significant implications across the public and private sector

Discount rate

- What the Lord Chancellor did was repeat the exercise performed in 2001 but in a different economic climate
- She applied the principles from *Wells v Wells*
- Lord Hope had said that the discount rate is the rate of interest to be expected when the investment is without risk
- That would assume a claimant would invest wholly in ILGS

PRACTICAL EXAMPLE

- Scottish Government provided practical example of effect of change in discount rate.
- An 18-year-old claimant who suffers a catastrophic injury in a road traffic accident is rendered quadriplegic. She requires 18 hours of daytime care, a night sleeper, some one-off equipment costs and increased care needs in later life. The annual care costs of such a claimant could typically exceed £100k. At 2.5% the total award of a claimant of this type of claim would receive a lump sum of maybe £5m to £6m.
- At a minus 0.75% discount rate this award could be around £9m, meaning perhaps a 60% increase in the lump sum.

Scottish Government

- Scottish Government produced a consultation paper “The Personal Injury Discount Rate How should it be set in the future? 30 March 2017
- The effect of the negative discount rate is to produce about a 60% increase in damages for future awards
- There are legitimate concerns about the impact of the negative discount rate on the NHS
- Where there is a PPO the annual figure will not be affected
- Lump sum awards are materially affected

Scottish Government

- Draft Legislation on The Personal Injury Discount rate (September 2017)
- The proposed legislation specifies that the rate is to be set by reference to expected rates of return on a low risk diversified portfolio of investments
- It was said that it is expected if a single rate were set today under the new approach the real rate might fall within the range of 0% to 1%
- https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/691654/personal-injury-discount-rate-impact-assessment.pdf

New Bill

- Justice Secretary David Gauke unveiled the Civil Liability Bill -20 March 2018
- This Bill includes changes to the way the personal injury discount rate is calculated
  - Set the rate with reference to ‘low’ risk rather than ‘very low risk’ investments better reflecting the evidence of the actual investment habits of claimants
  - Establish a regular review of the rate, the first within 90 days of the legislation coming into force and at least every 3 years thereafter
  - To establish an independent expert panel Chaired by the Government Actuary to advise the Lord Chancellor on the setting of the rate.

Periodical Payments

- Periodical Payment Orders (PPOs) are essentially guaranteed annuities planned to meet the whole or a proportion of the expected future costs and losses caused by the wrongful injury.
- They are often combined with a lump sum payment.
- The lump sum payment usually relates to past losses and solatium.
- In catastrophic injury cases a lump sum payment is of necessity limiting given the difficulties associated with forecasting life expectancy.

Periodical Payments

- In Scotland in *D's Parent & Guardian v Greater Glasgow Health Board* [2011] CSOH 99 it was said that "*It is for consideration whether statutory provision ought to be made in Scotland for the payment of damages by periodical payments similar to the provision that has been made in England and Wales and Northern Ireland. Parties were agreed that it would be helpful to have the same provision in Scotland.*"

PERIODICAL PAYMENTS

- In 1978 the Pearson Committee recommended that reviewable periodic payments should be the main remedy in cases of serious injury and death. This approach was modified by the emergence of structured settlements in the 1990s.
- In 1999 Lord Steyn in *Wells v Wells* called for a system of periodical payments.
- In 2000 Clinical Disputes Forum came out in favor of a change in compensation in the case of catastrophically injured claimants.
- In 2002 the Master of the Rolls Working party expressed concerns about the use of lump sum payments.
- In 2005 it was said that PPO's were a much better and fairer way of compensating those facing long term future loss and care needs.

PERIODICAL PAYMENTS

- Section 2 of the Damages Act 1996 allowed the court to award periodical payments with the consent of the parties.
- This power was initially little used, but the law was then further amended with effect from April 2005 so that the court could make periodical payment orders without the consent of the parties (1 April 2005 ss100 and 101 of the Courts Act 2003 amending s2 of the Damages Act 1996).
- Use “took off” when the court adopted ASHE 6115 (a survey of earnings) rather than the Retail Price Index in 2008.

Periodical Payments

- The introduction of PPO's in England was described by a former President of APIL as the most important development ever relating to the law of damages.
- There is provision that courts in Scotland may make such an order but only with the consent of parties.
- In *Civil Law of Damages: Issues in Personal Injury A Consultation Paper*, The Scottish Government December 2012, as part of a wider consultation the views of parties was sought on the merit of reviewing the existing approach to periodical payments in Scotland.

Periodical Payments

- In addition, the Scottish Government asked the same question as part of a a joint UK-wide consultation in relation to how the discount rate was set (*The Damages Act 1996-The Discount Rate-Review of Legal Framework*).
- Those who responded to both consultations were overwhelmingly in support of courts in Scotland having the necessary power to impose PPO's.
- A further joint consultation on the discount rate closed on 11 May 2017 (*The Personal Injury Discount Rate: How it should be set in the future*)
- There are draft provisions now for the introduction of PPOs and these can be found at hhtp://www.gov.scot/Resource/0052/00522973.pdf

ADVANTAGE OF PP's

- PPOs remove the need to make any discount in the award of damages and are tax free in the hands of the claimant.
- The money expected to be needed is paid by instalments when it is expected to be needed rather than in advance so that there is no question about whether the investment of the lump sum will produce enough income for the claimant.
- Life-time periodical payments will, however, pass longevity risk to the defendant, who will have to fund securely the payments to be made.

ADVANTAGE OF PP'S

- The attraction for the claimant is that there are no arguments about life expectancy.
- Lord Scarman had said that the only reasonable certainty about forecasts of life expectancy is that they are bound to be wrong.
- The claimant does not have the responsibility to try and invest a lump sum to ensure that there is sufficient money for life.
- The fact that the annual sum in respect of care costs is lined to ASHE and not the RPI and that makes it more likely the award will keep pace with wage increases and they can have continuity of care.
- There is less risk of under or over compensation than with the lump sum system.

Periodical Payments

- Further PPOs can be linked to a suitable index or measure so that they more closely match the loss in question and keep pace with inflation.
- ASHE is the Annual Survey of Hours and Earnings produced by the Office of National Statistics and the survey is broken down into hundreds of standard occupation codes.
- The Earnings data is not limited to the basic wage but includes overtime, unsocial hours payments, productivity payments and other benefits.

SECURITY

- PP's can, however, only be made when the payer is considered sufficiently secure.
- The court requires to be satisfied that a defender can meet the terms of the PP for the lifetime of a claimant regardless how long that may be.
- In England were defendants were not automatically secure they required to purchase an annuity to meet the obligations of the PPO. This is costly.
- PP's against UK regulated insurers are extremely secure not simply because of their general strength but also because the payments are guaranteed by the Financial Services
- Compensation Scheme. PP's ordered against the Health Boards and other taxpayer funded bodies are adequately secure as are those against the MIB, which is funded by a statutory levy on insurers.

FORMS OF PERIODICAL PAYMENTS

- Periodical payments orders can take a number of forms.
- They can be variable in very limited circumstances: that is the amounts payable can be reassessed in the light of a significant deterioration or improvement in the claimant's condition, if the original order permits this.
- Very few of these variable orders are thought to be made.
- Stepped orders, where the amount payable from time to time varies in accordance with the order as originally made, are more common (for example, where it is predicted that additional or reduced care will be required at certain times)

FORMS OF PERIODICAL PAYMENTS

- The most common form of periodical payment orders are orders where the payments can simply be index-linked to a variety of indices, including, for example, the Retail Price Index and ASHE 6115.
- In England where there is a substantial deduction for contributory negligence there is a view that PPOs may not be appropriate.
- However, they are not precluded and the fact that the payments are tax free and do not affect entitlement to receive free provision from the state or local authority may make them attractive.

Expert report

- Where a claimant is opting for a PP it is vital that an expert experienced in the proper preparation of a PP is used
- These are complex and important agreements that are intended to cover a claimant for the rest of the their life

Housing Claims

And the change in the Discount Rate

Housing Claims

- It is important to note the impact of the change in the discount rate has had on housing claims.
- The law underpinning the link between *Roberts v Johnstone* claims and the discount rate has been reviewed in *JR v Sheffield Teaching Hospitals [2017] EWHC 1245 (QB)* where no award was made for housing.
- A claimant is not entitled to claim the full cost of alternative accommodation (*George v Pinnock [1973] 1 W.L.R. 118*). The solution identified in *Roberts v Johnstone [1989] Q.B. 878* was described in *Manna v Central Manchester University Hospitals NHS Foundation Trust [2017] EWCA Civ 12* as imperfect but pragmatic.

Roberts v Johnstone

- Court of Appeal decided that the appropriate way to compensate a claimant for the loss associated with the need to purchase a more expensive property was to allow for the loss of use of the capital tied up in the property by reference to the tax-free yield which could otherwise have been anticipated in risk-free investments.
- Formula calculates the difference in value between the old and new properties and applying a notional interest rate to the resulting sum and then multiplying the interest figure produced by the lifetime of the claimant

Roberts v Johnstone

- In *George v Pinnock [1973] 1 WLR 118 CA* the court had concluded the claimant was entitled to the increased annual expense of purchase of the property
- In *Roberts* the claimant had already purchased a property and had put capital into the property using a substantial interim payment
- There was no actual borrowing to purchase the property
- The actual loss was a loss of income tied up in the capital

Roberts v Johnstone

- The fundamental objection was that however the claim was settled the claimant would still retain the capital award –the property
- That would result in a windfall to the claimant
- And a windfall to the estate on the claimant's death
- There would be over compensation
- A lump sum calculated on the basis of notional mortgage interest charges would also have produced a figure exceeding the net cost of the property

Roberts v Johnstone

- The underlying assumption in the *Roberts v Johnstone* calculation is that investment in property is virtually risk free and inflation proof
- The loss of access to funds was assessed at the “going rate “
- The rate of return for a risk adverse investor in ILGS is now a negative rate after tax and inflation
- The basis upon which claimants are now compensated has also radically changed in high value cases with the advent of the PPO

Roberts v Johnstone

- The arguments made for attaching the discount rate to the *Roberts v Johnstone* calculation
  - ILGS represents the best indicator of the “going rate” for foregoing the use of the money
  - It is the same rate for calculating future losses
  - It will be kept up to date by the Chancellor

Wells v Wells

- Prior to *Wells* the actual loss for the *Roberts v Johnstone* calculation was 2%
- In the conjoined appeal of *Thomas v Brighton Health Authority* the *Roberts v Johnstone* calculation was directly linked to the discount rate
- It was said that the loss the claimant had sustained was the "going rate" for foregoing the use of the money
- In *Thomas* the court linked the rate to ILGS

Thomas v Brighton Health Authority

- In *Thomas* the parents had purchased a larger property using a mortgage and not via capital from other heads of loss
- In *Thomas t*hey also had agreed *Roberts v Johnstone* was the correct approach
- The assumption at that time was that investment in property was virtually risk free
- However at that time there was not a negative discount rate

Negative Discount Rate

- The assumption is that the principle is to compensate the claimant for foregoing the use of money
- How can the going rate for foregoing the use of money be calculated on the basis of a negative interest rate?
- Is property investment now risk free, inflation proof?
- Commercial lenders do not lend at a negative discount rate

JR V SHEFFIELD TEACHING HOSPITALS NHS FOUNDATION TRUST

- The claimant had significant accommodation needs arising from severe spastic cerebral palsy. The need for accommodation was not in dispute in the case but the question was whether and to what extent there was a loss.
- The claimant argued that an award should be made even if the discount rate was a negative one.
- The judge concluded that he was bound by *Roberts v Johnstone* and was not in a position to find a fair and proper solution in that case having regard to the facts of the case and evidence before him.

JR V SHEFFIELD TEACHING HOSPITALS NHS FOUNDATION TRUST

- Suggested that given the current cost of borrowing it may be possible to say that the interest element on an appropriate mortgage (say £600,000 as the cost of a property less the amount of general damages) over a 25 year term would provide a reasonable figure
- Suggested in *George v Pinnock*
- Rejected in *Roberts v Johnstone* as the rate of mortgage interest at that time was so high that award would result in full recovery of capital cost of house

JR V SHEFFIELD TEACHING HOSPITALS NHS FOUNDATION TRUST

- It has also been suggested that a defender could take a revisionary interest in the property
- In that situation providing the full capital cost would not provide any windfall benefit
- It would simply provide the claimant with a property for the rest of their life.
- In JR it was argued that the court should award damages on a *Roberts v Johnstone* basis but adopting an annual loss of 2 ½ % rather than -0.75%
- No evidence for this substitute annual loss

JR V SHEFFIELD TEACHING HOSPITALS

- Case was due to go to Appeal next year
- Agreed settlement of £800,000 for housing
- The argument was that the Court of Appeal should revisit the approach to accommodation claims based upon a multiplier/multiplicand formula
- They should award damages based on the difference between the accommodation the claimant would have purchased or rented uninjured and his needs arising out of his disability

JR V SHEFFIELD TEACHING HOSPITALS

- It was assessed that the appropriate purchase price for the house was £900,000
- The accepted sum of £800,000 was making an allowance for the accommodation the claimant would have purchased or rented uninjured

The argument

- Should the claimant not be entitled to compensation based on the actual cost of borrowing to fund the purchase of a suitable property by either a
  - Capitalised lump sum
  - PPO for the interest charges under an interest only mortgage
- Should the purchase of property not be funded by way of an interest free loan for the balance of the capital required to purchase the property
- Rental

Additional Capital Costs

- In *George v Pinnock* the objection to a claimant receiving the capital cost of purchasing a property was that the claimant or his estate would receive a windfall benefit
- The estate would however be subject to tax which would reduce the benefit of any windfall
- In that situation the claimant does not benefit personally

Collateral Benefit

- There has been little consideration of the issue of collateral benefit either in *George v Pinnock* or in *Roberts v Johnstone*
- *Darryl Allen QC* argues that review of *Lagden v O'Connor [2003] UKHL 64* and comments made by Lord Hope is of assistance in considering the issue of collateral benefit
- Reference was made to the underlying principle that the purpose of an award of damages is to place the injured party in the same position as he was prior to the accident

Collateral Benefit

- In *Lagden v O'Connor* reference was made to *The Gazelle (1844) 2 W Rob 279*
- Case involved a vessel damaged in a collision
- "If the settlement indemnification be attended with any difficulty…the party in fault must bear the inconvenience. He has no right to fix this inconvenience upon the injured party; and if that party derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden, which the law will not place upon him."

Collateral Benefit

- In *Lagden* it was said:
  - It is for the defendant who seeks a deduction from expenditure in mitigation on the grounds of betterment to make his case for doing so
  - It is not enough that an element of betterment can be identified
  - It has to be shown the claimant had a choice and that he would have been able to mitigate his loss at less cost
  - The wrongdoer is not entitled to demand of the injured party that he incur a loss, bear a burden or make unreasonable sacrifices in the mitigation of his damages

Collateral Benefit

- Lagden said:
- The defendant is entitled to demand that, where there are choices to be made, the least expensive route which will achieve mitigation must be selected
- If the evidence shows the claimant had a choice, and that the route to mitigation which he chose was more costly than an alternative open to him then a case will have been made out for a deduction
- If the claimant had no other choice then the betterment must be seen as an incidental step which he was entitled to take in mitigation of his loss and there is no ground for deduction

Cost of Borrowing Approach

- *Roberts* expressly rejected damages could be assessed on the notional cost of borrowing
- That was directly related to the fact the rate of mortgage interest was so high that the award would result in recovery of the full capital cost
- In *JR* the life expectancy was 70 and adopting a lifetime multiplier of 52.94 and a rate of interest of 2% or more would lead to an award far exceeding the full capital cost of purchasing the property

Cost of Borrowing

- What about considering the ‘actual cost’ of borrowing?
- Interest only mortgages not freely available
- Is it arguable applying the principles in *Ladgen v O’Connor* as suggested by Darryl Allen QC the defenders should compensate the claimant for this cost
- If the cost of borrowing exceeds the capital value of the property damages are capped at the value of the property
- Cost of borrowing should be awarded by lump sum or PPO

Interest Free Loan

- The property could be purchased with the compensator providing 100% of the purchase price
- The claimant grants the compensator the right to the house on the claimant's death
- The claimant's lifetime needs would be met without speculation as to life expectancy
- In this approach the windfall argument is addressed
- However what if the claimant put money into the house which had the effect of increasing the value. What about family members who have rendered care and live in the house.
- The compensator would be left with an adapted house to sell

Funding an interest only mortgage

- The claimant wants to purchase a property at 1,100,000.00
- He was likely to purchase a property at £385,000.00
- There are online mortgage calculators and the gross monthly cost of the interest only mortgage can be calculated for both scenarios
- You would need to account for the need to put in a lump sum
- The cost of the mortgage for say a 25 year period can be valued

Funding an Interest only mortgage

- Alternatively you could look at the annual mortgage cots for each property and apply a lifetime multiplier to the respective costs
- What about the betterment argument?
- The sum arrived at would be used to purchase the property as in reality he would not get a mortgage
- If this is done then the claimant has chosen to use the lump sum calculated in this way and will top it up
- The defender has not directly paid for the property

Expert reports

- It is clear following JR that the courts required evidence upon which to base an award
- Mark Holt at Frenkel Topping Limited in Manchester is now regularly preparing reports assessing the cost of an interest only mortgage in these cases
- He is also able to assess other ways of approaching the claim

Rental

- This has been suggested as an option but does not superficially seem a good option
- Rental charges for a suitable property could be obtained
- There would need to be credit for the lifetime cost of renting a smaller property with the ‘but for’ position
- The claimant would need to find a suitable landlord
- That could produce an annual sum to which a lifetime multiplier could be applied

Montgomery v Lanarkshire Health Board

- Consent and the Expert witness role following the decision of the Supreme Court in *Montgomery v Lanarkshire Health Board*

Montgomery

- This is a case about choice, options, alternatives
- Nadine Montgomery was not given information about the option's for delivery of her baby
  - Elective caesarean section
  - Vaginal delivery with the option to proceed to caesarean section should problems be encountered
- Both were reasonable options
- To enable her to exercise choice she required to be advised of the risks and benefits of each option
- The choice was hers to make when fully informed

Informed Consent

- This was a doctrine developed in US jurisprudence and was designed to expand the liability of doctors
- *Salgo v Leland Stanford Junior University Board* of Trustees (1957)
  - Initially said a doctor should disclose the facts necessary for the basis of “intelligent” consent
  - Then referred to “informed” consent
- In *Sidaway* Lord Scarman recognised that it is a misnomer to use the term informed consent
  - To obtain real or valid consent the patient must be informed.

Informed Consent

- The use of this term has led to a flawed interpretation of information disclosure
- The main focus of patient self-determination is choice rather than consent
- It incorrectly focuses on obtaining patient consent when in fact a refusal ought to be respected equally
- Patients should make informed decisions about the options available and in that situation real or valid consent is obtained

Pre-Montgomery test- Information Disclosure

- For many years in law a patient's right to information has been circumscribed by what doctors as a professional body thought they should be told
  - *Sidaway v Bethlem Royal Hospital Governors*
- The test was based on *Hunter v Hanley* and *Bolam* with an exception to the use of the test
  - Where a patient asked specific questions
  - Where a risk was material or significant
  - Lord Bridge talked about a substantial risk of grave consequences
  - Lack of consistency in this decision

GMC Guidance

- Since 1995 the GMC has recognised the right of the patient to be fully involved in decisions about their care
- Specific consent guidance was provided as early as 1998 and there was a recognition that information disclosure was linked to the particular patient
  - provide patients with appropriate information, which should include an explanation of any risks to **which they may attach particular significance to**

GMC Guidance

- The 1998 Guidance on consent explained that the information patients might want or ought to know, before deciding whether to consent to a treatment or investigation may include:
  - Details of the diagnosis, and prognosis, and the likely prognosis if the condition was left untreated
  - Uncertainties about the diagnosis including options for further investigation prior to treatment
  - Options for treatment or management of the condition, including the option not to treat

GMC Guidance

- In 2008 the specific guidance on consent was updated and a basic model was provided for patients who had capacity to make decisions for themselves
- The doctor uses specialised knowledge and experience and clinical judgement, **and the patient's views** and understanding of their condition, to identify which investigations of treatments are likely to result in overall benefit for the patient

GMC Guidance

- The doctor explains the options to the patient, setting out the potential benefits, risks, burdens and side effects of each option, including the option to have no treatment
- The patient weighs up the potential benefits, risks and burdens of the various options as well as any non-clinical issues that are relevant to them
- The patient decides whether to accept any of the options, and if so which one
- They have the right to accept or refuse an option for a reason that may seem irrational to the doctor, or for no reason at all

Other common law Jurisdictions

- Canada introduced a patient-focused test in the 1980's in *Reibl v Hughes*
- 1992 the Australian High Court in *Rogers v Whitaker* introduced what was at that time the most patient- orientated doctrine of consent amongst the common law jurisdictions
- In 1992 Southern Ireland first made reference to the principles in *Reibl v Hughes* and in 2000 there was a move towards a reasonable patient standard further clarified in 2007

The Montgomery test

- The Supreme Court set out the correct legal test to be applied to cases of information disclosure
- The correct position, in relation to the risks of injury involved in treatment, can now be seen to be substantially that adopted in *Sidaway* by Lord Scarman, and by Lord Woolf MR in *Pearce*, **subject to the refinement made by the High Court of Australia in *Rogers v Whitaker***

Montgomery-Duty of the Doctor

- A doctor is under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment
- And of any **reasonable** alternative or variant treatments
- The test of materiality is replicated directly from the Australian decision of *Rogers v Whitaker*

The Montgomery test

- It is important to recognise that the test is a two-limbed test
- The first limb of the test applies objective criteria and focuses on the requirements of a reasonable or ordinary person in the patient's position
- The second limb of the test allows the courts to consider the particular patient and their requirements or fears (reasonable or unreasonable)
- The latter is subject to the caveat that the doctor is or ought to be aware of them

What is the role of the expert in a consent case?

- What is the legal test applied to cases of failure to consent?
- What is the role of the expert witness in a case where it is alleged that there was a failure to consent?
- What is the role of the expert on causation issues in a failure to consent case?

What is a Material Risk?

- This has been considered extensively in other jurisdictions
- A risk has been held to be significant if it is material to a reasonable patient's decision
- It is not simply a question of the incidence of the risk but also depends on the severity of the consequences should the risk materialise
- GMC position in *Montgomery* was that where there is a risk of catastrophic injury, even at a low level this required to be discussed with the patient

Use of Professional practice test

- There is no suggestion in the GMC Guidance that information disclosure to patients should be filtered in any way based on what doctors normally advise
- In *Montgomery i*t was argued that the *Bolam* and *Hunter v Hanley* tests had no place in the area of information disclosure
- Neither Australia nor Canada use the professional practice test to permit justifiable filtering of information

Important points to remember

- It is for the court and not the expert to decide if the patient has been properly consented
- It is for the court to decide whether a risk is material
- The test of materiality is now patient focused
  - Reasonable patient in the particular patient's position
  - Or if the doctor knew something was particularly important to this patient
- The *Bolam* test is no defence

Role of the expert

- The expert may assist the court with evidence on potential alternative treatments available
- The expert may assist the court with the statistical probability of a risk occurring and the consequences should a risk occur
- The expert should not
  - Provide a view on whether there was consent
  - Provide a view on what the patient would have done if properly consented
- The court makes that decision

The Supremes –The final word

- There was recognition that the guidance issued by the GMC in 2008 had addressed the issue of what was required
- “It is nevertheless necessary to impose legal obligations, so that even those doctors who have less skill or inclination for communication, or who are more hurried, are obliged to pause and engage in the discussion which the law requires. “

The Supremes-The Final Word

- There was recognition that the decision may not be welcomed by some healthcare providers
- “The approach which we have described has long been operated in other jurisdictions, where healthcare practice presumably adjusted to its requirements. “
- ”In so far as the law contributes to the incidence of litigation, an approach which results in patients being aware that the outcome of treatment is uncertain and potentially dangerous, and in their taking responsibility for the ultimate choice to undergo that treatment, may be less likely to encourage recriminations and litigation in the event of adverse outcome”

The Supremes -The Final World

- “We would accept that a departure from the *Bolam* test will reduce the predictability of the outcome of litigation, given the difficulty of overcoming that test in contested proceedings. It appears to us however that a degree of unpredictability can be tolerated as the consequence of protecting patients from exposure to risks of injury which they would otherwise have chosen to avoid.”
- “The more fundamental response to such points, however, is that respect for the dignity of patients requires no less.”