

Damages: Accommodation for accommodation costs

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In a Judgment which will have consequences for lawyers and their insurers, the Court of Appeal decision in *Swift v Carpenter* [2020] EWCA Civ 1295, a test case for accommodation claims in personal injury litigation, was handed down on 9 October 2020.

In personal injury litigation, claimants who have suffered life-changing injuries frequently require a new property to meet their care requirements.

The formula for calculating accommodation claims was historically set out in *Roberts v Johnstone* [1989] Q.B. 878. It has been a long held concern that compensating a claimant for the capital amount needed to purchase a new property will result in the claimant's estate receiving a windfall upon their death as the value of the property increases - flouting the principle that damages should put a claimant back in the position that they would have been in but for the accident.

To avoid such an outcome, the approach in *Roberts* meant that a claimant was required to "borrow" from other heads of loss in their damages awards to fund the purchase of a property. Perversely, since the Lord Chancellor's shift to a negative discount rate of -0.25% (-0.75% at the date of the trial in *Swift*), using the approach in *Roberts*, the discount rates were generating a negative damages value for claimants.

The Court of Appeal in *Swift* ruled that it was not "full, fair or reasonable" to leave claimants with no damages for accommodation costs, even if there was a long-term danger of receiving a windfall.

It was decided that the most equitable approach would be to deduct the 'windfall' from the full value of the additional capital cost of the property. It is not easy to achieve in practice. Ultimately the Court favoured a method in *Swift* which involves awarding a claimant the full additional capital cost of purchasing new accommodation and then deducting the value of the reversionary interest.

In reaching that decision the Court accepted that there may be instances where it is inappropriate to apply the *Swift* method. For example, cases involving shorter life expectancies 'may require a different approach.'

Lawyers on both sides need to give careful consideration to any existing offers in place in personal injury claims. A failure to do so may lead to under-settlement, offers being withdrawn or offers not providing the protection that was originally intended. In the event of any of those, the acting solicitor may become the unwitting target of a negligence claim.

We can expect to see further guidance from the Supreme Court so this may not be the end of the matter, but in the meantime it is important to revisit those cases featuring accommodation costs.

Authors



Adam Smith

Leeds

+44(0)113 251 4988

adsmith@dacbeachcroft.com



James Hazlett

Leeds

+44 (0)113 251 4733

jhazlett@dacbeachcroft.com



Catrin Davies

Newport

+ 44 (0)1633 657682

cadavies@dacbeachcroft.com