

# **Quantum Update: A look back at the last 12 months and forward to the next**

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# Quantum Update

## Included:

- ▶ Swift v Carpenter
- ▶ Fatal accidents: a review of the latest cases on financial dependency
- ▶ Aggravated damages: what's the position?
- ▶ Covid-19: the impact on quantum

## Not included:

- ▶ C v Chief Constable of NI [2020] NIQB 3 – HR damages
- ▶ A-G of St Helena v Ab & Ors [2020] UKPC 1 – GD's St Helena
- ▶ Irani v Duchon [2019] EWCA iv 1846 – Separate talk on Ogden 8

# Swift v Carpenter

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# Swift v Carpenter – The decision

- ▶ RTA 31 October 2013
  - ▶ C passenger; D driver and partner (now husband)
  - ▶ left lower leg amputation and significant injury to right foot
  - ▶ 39 at accident and 43 at trial
  - ▶ LE of 89.1 – lifetimes multiplier of 55.02 (-0.75%)
- ▶ Judge at 1<sup>st</sup> instance
  - ▶ Lump sum of £4,098,051
  - ▶ £900k needed special accommodation (i.e. cost of purchase less cost of sale of existing property)
  - ▶ Bound by *Roberts v Johnstone* –
    - ▶ “Going rate” of lost opportunity to spend money.
    - ▶ Subsequently linked to DR set by Lord Chancellor in Damages Act
    - ▶ No award for accommodation as negative discount rate

# Swift v Carpenter – The decision

- ▶ On appeal
  - ▶ None of the arguments adopted in favour of accommodation put forward on appeal
  - ▶ PIBA intervened
  - ▶ Further evidence from
    - ▶ Economists; Actuaries; Mortgage experts; Experts in the valuation of reversionary interests
- ▶ The issues on appeal:
  - ▶ CA bound by *RvJ*; should court revisit *RvJ*
  - ▶ Full capital cost or a reduction for windfall

# Swift v Carpenter – The decision

- ▶ The decision (unanimous)

Wells v Wells not binding as to application of *RvJ*

- ▶ Situation contrasted with *Knauer v MOJ* [2016] UKSC 9
- ▶ RvJ guidance to achieve an end consistent with principle – not a statement of principle itself
- ▶ Guidance outlived the conditions which gave rise to it

Court should award damages for special accommodation

- ▶ The windfall problem
  - ▶ House: Not just a place to live but a capital asset which can be sold
- ▶ Court should not stick with RvJ
  - ▶ Nil compensation not fair even if a windfall (which is uncertain)
  - ▶ Cash-flow model which justifies RvJ: conjecture, complexity, uncertainty

# Swift v Carpenter – The decision

- ▶ The decision (unanimous)

Full capital cost or full capital cost less windfall

- ▶ The windfall should be avoided if at all possible
- ▶ Reversionary interest can be used as proxy for windfall
- ▶ Reversionary interest:
  - ▶ The current value of interest in property which only manifests upon death of life tenant in X years
- ▶ Market approach to value reversionary interest preferred
  - ▶ Foster & Cranfield
  - ▶ 5% - the judgment of Solomon
  - ▶ “Practical if imperfect”
- ▶ Respondent sought PTA

# Swift v Carpenter – The calculation

- ▶ First calculate the value of reversionary interest:
- ▶  $R = (NP - OP) \times 1.05^{-L}$
- ▶ The calculation the damages by deducting the reversionary interest
- ▶ Damages award:  $D = (NP - OP) - R$
- ▶ R = reversionary interest  
NP = value of property now required  
OP = value of property owned but for the accident  
L = predicted life expectancy

# Swift v Carpenter – The calculation

Value of reversionary interest and life interest of 1 at 5% as per judgment in <i>Swift v Carpenter</i>									
Life expectancy in years	Value of reversion	Value of life interest	Life expectancy in years	Value of reversion	Value of life interest	Life expectancy in years	Value of reversion	Value of life interest	
1	0.95238	0.04762	36	0.17266	0.82734	71	0.03130	0.96870	
2	0.90703	0.09297	37	0.16444	0.83556	72	0.02981	0.97019	
3	0.86384	0.13616	38	0.15661	0.84339	73	0.02839	0.97161	
4	0.82270	0.17730	39	0.14915	0.85085	74	0.02704	0.97296	
5	0.78353	0.21647	40	0.14205	0.85795	75	0.02575	0.97425	
6	0.74622	0.25378	41	0.13528	0.86472	76	0.02453	0.97547	
7	0.71068	0.28932	42	0.12884	0.87116	77	0.02336	0.97664	
8	0.67684	0.32316	43	0.12270	0.87730	78	0.02225	0.97775	
9	0.64461	0.35539	44	0.11686	0.88314	79	0.02119	0.97881	
10	0.61391	0.38609	45	0.11130	0.88870	80	0.02018	0.97982	
11	0.58468	0.41532	46	0.10600	0.89400	81	0.01922	0.98078	
12	0.55684	0.44316	47	0.10095	0.89905	82	0.01830	0.98170	
13	0.53032	0.46968	48	0.09614	0.90386	83	0.01743	0.98257	
14	0.50507	0.49493	49	0.09156	0.90844	84	0.01660	0.98340	
15	0.48102	0.51898	50	0.08720	0.91280	85	0.01581	0.98419	
16	0.45811	0.54189	51	0.08305	0.91695	86	0.01506	0.98494	
17	0.43630	0.56370	52	0.07910	0.92090	87	0.01434	0.98566	
18	0.41552	0.58448	53	0.07533	0.92467	88	0.01366	0.98634	
19	0.39573	0.60427	54	0.07174	0.92826	89	0.01301	0.98699	
20	0.37689	0.62311	55	0.06833	0.93167	90	0.01239	0.98761	
21	0.35894	0.64106	56	0.06507	0.93493	91	0.01180	0.98820	
22	0.34185	0.65815	57	0.06197	0.93803	92	0.01124	0.98876	
23	0.32557	0.67443	58	0.05902	0.94098	93	0.01070	0.98930	
24	0.31007	0.68993	59	0.05621	0.94379	94	0.01019	0.98981	
25	0.29530	0.70470	60	0.05354	0.94646	95	0.00971	0.99029	
26	0.28124	0.71876	61	0.05099	0.94901	96	0.00924	0.99076	
27	0.26785	0.73215	62	0.04856	0.95144	97	0.00880	0.99120	
28	0.25509	0.74491	63	0.04625	0.95375	98	0.00838	0.99162	
29	0.24295	0.75705	64	0.04404	0.95596	99	0.00798	0.99202	
30	0.23138	0.76862	65	0.04195	0.95805	100	0.00760	0.99240	
31	0.22036	0.77964	66	0.03995	0.96005	101	0.00724	0.99276	
32	0.20987	0.79013	67	0.03805	0.96195	102	0.00690	0.99310	
33	0.19987	0.80013	68	0.03623	0.96377	103	0.00657	0.99343	
34	0.19035	0.80965	69	0.03451	0.96549	104	0.00626	0.99374	
35	0.18129	0.81871	70	0.03287	0.96713	105	0.00596	0.99404	

# Swift v Carpenter – Future arguments

- ▶ Short life expectancy
- ▶ Capital cost £900,000 (New property less old property)
  - ▶ LE 45.43 = £801,912
- ▶ BUT IF
  - ▶ LE 20 = £560,799
  - ▶ LE 10 = £347,458
  - ▶ LE 5 = £194,826
- ▶ *I must emphasise that I am concerned only with a case of the present kind, where the claimant has a long life expectancy. In such a case the application of a discount rate of 5% (which, to anticipate, I agree is the correct rate) will mean that the shortfall between the cost of the additional element and the amount awarded will typically be comparatively small ... The position will be different in short life-expectancy cases, of the kind illustrated by paradigm 3. (Underhill LJ [228])*
- ▶ *If it were to prove impossible here to award a claimant full compensation without a degree of over-compensation, then it seems to me likely that the principle of fair and reasonable compensation for injury would be thought to take precedence. (Irwin LJ [206])*

# Swift v Carpenter – Future arguments

- ▶ Taking into account mortality in the future life expectancy
- ▶ *The Respondent suggests, for technical reasons, that in substitution for table 28 of the Ogden tables which concern multipliers for term certain, Mr Daykin should have used Ogden table 2, which would produce approximately 10% difference in the figures. ... In my view the Appellant and Intervener are correct on that point for the reasons given by Mr Daykin. The relevant risks and the future life expectancy have already been settled by the judge's findings. (Iwin LJ para 170)*
- ▶ Is table 1 and table 2 more appropriate?
  - ▶ A consistent approach between accommodation and other life-long losses
  - ▶ Can make a substantial difference to the numbers
- ▶ But is there scope for the argument?

# Swift v Carpenter

## Swift v Carpenter

## Property Value £900,000 Life Expectancy 45

<b>Discount Rate</b>	<b>1%</b>	<b>2%</b>	<b>3%</b>	<b>4%</b>	<b>5%</b>
Life Annuity at age 43.58 for female	35.99	29.21	24.24	20.51	17.66
Table 28 multiplier for life expectancy of 45.43	36.55	29.96	25.00	21.20	18.26
Assurance of 1 on death	0.6363	0.4067	0.2611	0.1683	0.1090
<b>Assurance using life annuity</b>	<b>0.6419</b>	<b>0.4216</b>	<b>0.2835</b>	<b>0.1956</b>	<b>0.1384</b>
Value of reversion of £900K (defendant's interest)	572,694	366,047	234,989	151,502	98,087
Rounded value of reversionary interest	573,000	366,000	235,000	152,000	98,000
<b>Calculation Using Mr Daykin's Life Annuity</b>	<b>577,686</b>	<b>379,409</b>	<b>255,145</b>	<b>176,025</b>	<b>124,529</b>
Value of life interest in £900K (claimant's interest)	327,306	533,953	665,011	748,498	801,913
Rounded value of life interest	327,000	534,000	665,000	748,000	802,000
<b>Value of life interest allowing for mortality</b>	<b>322,314</b>	<b>520,591</b>	<b>644,855</b>	<b>723,975</b>	<b>775,471</b>

# Swift v Carpenter – Future arguments

- ▶ Adjustment to the multiplier
- ▶ Where evidence injured person to leave new property before death, to live in nursing home or with relative –
  - ▶ Multiplier to death results in overcompensation
- ▶ *Irwin LJ acknowledges that possibility, but says that it will occur only rarely. I am not sure that I agree about that. However, I would still agree with him that the reversion should be valued at the predicted date of death (except perhaps in unusual circumstances where the probability of a substantially earlier release of capital was high). (Underhill LJ [229])*
- ▶ An argument still open given Irwin LJ's finding that reversionary interest to death usually right
  - ▶ Impractical if imperfect

# Swift v Carpenter – Future arguments

- ▶ The notional reversionary interest: 5%
- ▶ *Not a straightjacket to be applied universally and rigidly. There may be cases where this guidance is inappropriate. However, for longer lives, during conditions of negative or low positive discount rates, and subject to particular circumstances, this guidance should be regarded as enduring*
- ▶ Significant change =?
  - ▶ Change to Foster & Cranfield market rates?
  - ▶ Change to DR in Damages Act to a positive rate
  - ▶ Supreme Court

# Fatal Accidents: Financial dependency

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# Fatal Accidents: Financial Dependency

## *Witham v Steve Hill Ltd* [2020] EWHC 299 (QB)

- ▶ Fatal mesothelioma.
- ▶ The Claimant and the deceased were long-term foster carers for 2 children with disorders on the autism spectrum. The deceased gave up his career to fulfil the children's care needs full-time.
- ▶ Was the Claimant entitled to a claim for damages as a dependant upon the deceased for remaining at home to provide childcare & domestic services, allowing her to continue her career as a specialist paediatric nurse? Was this a loss within s.3(1) of the Fatal Accidents Act 1976?
- ▶ Or, as the Defendant contended, was this an attempt to relabel the loss of the children (who were not eligible dependants within the Act) as one of the Claimant's in order to recover?

# Fatal Accidents: Financial Dependency

*Witham v Steve Hill Ltd* [2020] EWHC 299 (QB)

Held:

- ▶ Yes, this did fall within s.3(1) FAA, which is a “wide gateway”
- ▶ The question is whether the dependant had “a reasonable expectation of pecuniary advantage from the continuance of the life of the deceased”.
- ▶ It is important to look at the true situation irrespective of whether there is another party involved who is not a dependant. Here, the children effectively suffered no loss as their care was replaced by their foster mother, the Claimant, who suffered the true loss.
- ▶ The value of that loss was not the Claimant’s lost career, but rather the cost of replacement care for the children.

# Fatal Accidents: Financial Dependency

*Rix v Paramount Shopfitting Co. Ltd* [2020] EWHC 2398 (QB)

- ▶ Fatal mesothelioma.
- ▶ The deceased established a highly successful limited company, which was still expanding when he fell ill in 2015. He owned 40% shares in the company, his wife, the Claimant, also owned 40%, the rest was split between their two sons. Mr & Mrs Rix drew tax efficient salaries from the company, not reflective of their respective contributions.
- ▶ On Mr Rix's death, the Claimant inherited his shares and her sons took over the business and increased its profitability.
- ▶ Was the Claimant entitled to claim for loss of financial dependency when she had inherited her husband's share of the business, which continued to produce income?

# Fatal Accidents: Financial Dependency

*Rix v Paramount Shopfitting Co. Ltd* [2020] EWHC 2398 (QB)

Held:

- ▶ Dependency in the context of s.3 FAA 1976 is judged at death (*Welsh Ambulance Services v Williams* [2008] EWCA Civ 81 followed).
- ▶ At death, there was a loss of dependency on the hard work that the deceased had put into the business.
- ▶ The profitability of the business after death was irrelevant.
- ▶ The court must look at the practical reality. Here, that was that “*the income that Mrs Rix received as director and shareholder was entirely the result of her husband’s work for the business*”.
- ▶ The court’s role is not to compare the dependant’s income before and after death and to award the shortfall. That would be to usurp the assessment of dependency at the time of death.

# Fatal Accidents: Financial Dependency

*Head v The Culver Heating Co. Ltd* [2019] EWHC 1217 (QB)

- ▶ Living mesothelioma.
- ▶ The Claimant was the MD of a successful business in which his wife & sons were also employed. The Claimant and his wife each held 45% shares, the sons each held 5%.
- ▶ The Claimant enjoyed both a salary and dividend income from the business. The business has a strong financial foundation and would continue to be run by the sons.
- ▶ The Claimant's wife earned a tax efficient salary from the business, not reflective of her contributions.
- ▶ Is it relevant to a “lost years” calculation that a significant part of the Claimant's earnings, namely his dividend income, is likely to survive his death?

# Fatal Accidents: Financial Dependency

*Head v The Culver Heating Co. Ltd* [2019] EWHC 1217 (QB)

Held:

- ▶ As in *Rix*, the court had view to the practical reality of the situation. Here, this was that the Claimant was the driving force behind the business and his wife held her shares as advised by the Claimant and their accountant.
- ▶ The Defendant relied on and the Court adopted the principles of *Adsett v West* [1983] QB 826, which distinguished between earned income from employment and income derived from capital that survives death.
- ▶ Since the dividend income that the Claimant and his wife enjoyed was held to be likely to survive death, and this income is greater than the “surplus” income that the Claimant currently enjoys (i.e. the money left over from total income after living expenses are paid), the claim was assessed at nil.

## Fatal Accidents: Financial Dependency

- ▶ Does dependency crystallise at the point of death or is what happens after death relevant?
- ▶ Can a loss of income dependency actually be measured in terms of hard work, rather than pure finances?
- ▶ Is there a good reason why “lost years” calculations in living claims should be different in principle to income dependency calculations in fatal claims?

# Aggravated damages

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# Aggravated Damages

- ▶ A separate award, made in addition to the basic compensatory award.
- ▶ Based on aggravating features of the defendant's conduct. They are compensatory, not punitive.
- ▶ Rare in personal injury cases.

## *Doherty v MoD* [2020] NICA 9

- ▶ M had been killed during the Bloody Sunday massacre in 1972, whilst sheltering near a telephone box.
- ▶ The trial judge found that the soldiers' action had been "*exceptional and contumelious and was imbued with a degree of malevolence and flagrancy which was truly exceptional.*"
- ▶ £15,000 award in compensatory and aggravated damages.
- ▶ Appeal by the MoD dismissed.

# Aggravated Damages: *Doherty v MoD* [2020] NICA 9

Confirmed:

- ▶ An award of aggravated damages is permissible only where two conditions are satisfied:
  - ▶ (i) There must be exceptional or contumelious conduct or motive on the part of the tortfeasor in committing the wrong or subsequent to its commission.
  - ▶ (ii) The Claimant must suffer mental distress as a result.

# Aggravated Damages: *FZO v Adams* [2019] EWHC 1286 (QB)

- ▶ Aggravated damages in the context of sexual abuse.
- ▶ A historical claim in which the Claimant had been sexually abused by his PE teacher. The abuse involved rape and degradation.
- ▶ The Claimant suffered mental health problems, a breakdown, and complex PTSD as a result of the abuse.

Held:

- ▶ The Defendant's behaviour fully warranted an award of aggravated damages. His actions had robbed the claimant of all self-esteem and dignity. Aggravated damages were necessary to properly compensate the Claimant.
- ▶ A rolled up award of £85,000 for PSLA and aggravated damages was made.

See also: £10,000 aggravated damages in *WCC v Allan Steer* [2019] EWHC 1874 (QB)

# Covid-19: the impact on quantum

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# Covid-19: The impact on quantum

- ▶ First national lockdown on 23 March 2020 – restrictions easing in May and June
- ▶ Local lockdowns started on 30 June (Leicester)
- ▶ Eat out to help out in August
- ▶ Rule of 6 – 14 September 2020
- ▶ Three tier system commenced on 14 October 2020
- ▶ Circuit breaker? Second national lockdown?
- ▶ End date?
- ▶ When will mass public gatherings (aka super-spreader events) be allowed again?

# Covid-19: The impact on quantum

## A winter of discontent?

- ▶ Unemployment – 4% Before lockdown – now 4.5% (ONS)
- ▶ Disproportionate impact younger people 16-24 years olds
- ▶ Furlough scheme ends in October
- ▶ Jobs support scheme – Nov 20 to April 21 – requires e'ee to work at least 33% of hours
- ▶ Certain sectors decimated – tourism and aviation
- ▶ ONS figures 7 to 20 September
  - ▶ 86% of businesses still trading (14% gone)
  - ▶ 47% of businesses – decreased in turnover
  - ▶ 9% of workforce on furlough
  - ▶ Further 3% intended permanently close within 3 months

# Covid-19: The impact on quantum

- ▶ Consequences of Covid-19 on damages
  - ▶ Likely to be fact specific
  - ▶ Not at this stage predictable and foreseeable
- ▶ Difficult issues which likely to occur:
  - ▶ If C would benefit from treatment for injury but treatment not available because of covid-19 can C recover for the cost?
  - ▶ What C does with damages irrelevant (*Wells*) v C not entitled to recover for expenses he will never incur (*Woodrup*)

# Covid-19: The impact on quantum

## Loss of earnings

- ▶ Normal approach is MvM using 'career model'
- ▶ *In any claim for injury to earning capacity based on long-term disability, the task of the court in assessing a fair figure for future earnings loss can only be effected by forming a view as to the most likely future working career ('the career model') of the claimant had he not been injured. Where, at the time of the accident, a claimant is in an established job or field of work in which he was likely to have remained but for the accident, the working assumption is that he would have done so and the conventional multiplier/multiplicand method of calculation is adopted, the court taking into account any reasonable prospects of promotion and/or movement to a higher salary scale or into a better remunerated field of work, by adjusting the multiplicand at an appropriate point along the scale of the multiplier.* (Para 23 Potter LJ)
- ▶ *Herring v MOD* [2003] EWCA Civ 528

# Covid-19: The impact on quantum

## Loss of earnings

- ▶ But normal approach can be departed from in certain circumstances
- ▶ *“it is a truism that the assessment of future loss in this field is in a broad sense the assessment of a chance or, more accurately, a series of chances as to the likely future progress of the claimant in obtaining, retaining or changing his employment, obtaining promotion, or otherwise increasing his remuneration. Nonetheless, such assessment has not traditionally been regarded as necessitating application of the technique of percentage assessment for ‘loss of a chance’ ... . In cases such as *Doyle v Wallace* and *Langford v Hebran* the court has in special circumstances felt obliged to adopt such a method in order to calculate particular aspects of the claimant’s future loss claim. (Para 25 Potter LJ)*

# Covid-19: The impact on quantum

## Loss of earnings

- ▶ Finally add in the possibility of a *Blamire* award appropriate where:
- ▶ *There will be no real alternative to a Blamire award if, for example, there is insufficient evidence or there are too many imponderables for the judge to be able to make the findings necessary to support the multiplicand/multiplier approach.* (Hamblen LJ – para 22 – *Irani v Duchon* [2019] EWCA Civ 1846)
- ▶ In circumstances where:
  - ▶ C has lost employment
  - ▶ Evidence to support C's employment at significant risk
  - ▶ Evidence that C's sector of work (e.g. aviation)
- ▶ What should court do?

# Covid-19: The impact on quantum

- ▶ A menu of options for court:
  - ▶ MvM
  - ▶ MvM allowing a discount to take into account Covid-19 factors (RF does not take into account Covid-19)
  - ▶ Loss of a chance analysis
  - ▶ *Blamire*
  - ▶ No loss proved
- ▶ What should court do?
  - ▶ All to fight for by D's and C's
  - ▶ C: if purely impressionistic award (*Blamire*) cure worse than disease
  - ▶ D: if MvM award without discount likely to be overcompensation

# Thank you for listening

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