Accommodating windfalls: Swift v Carpenter

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Claims for "special accommodation"

The old law:

George v Pinnock [1973] 1 WLR 118

Roberts v Johnstone [1989] QB 878) (2%)

Formula: extra cash needed x 2% x M(life)

The old calculation (in say 1992)

Old property = £400k

Special accommodation = £1.3M

Differential = £900k

Claimant female aged 45

RvJ = 23.82 x 2% of £900k =

£428k

Plus moving costs

Plus adaptation costs

-Betterment + reinstatement

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More history

House prices have risen

GDs / awards not risen so fast

Court's process of damages assessment more scientific

Advent of PPO's for care – limits available cash

And finally…

Negative discount rate

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The death of R v J and "the 2%"

Wells v Wells : Thomas v Brighton HA [1993]
(3% pending s.1 Damages Act)

Damages Act 1996 June 2001 2.5%

20.03.17 Liz Truss -0.75%

JR v Sheffield Teaching Hospitals NHS Foundation
  Trust [2017] EWHC 1245

05.08.19 David Gauke -0.25%

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Swift v Carpenter

Claimant (C) aged 39 when injured (Lx 45.43)

Below-knee amputation to the left leg and serious injury to right foot

C reasonably required a more expensive property

£2,350,000 less cost of existing property £1,450,000 = £900,000.

Lambert J held bound by RvJ

Award = nil

Swift v Carpenter

CA bound by Roberts v Johnstone ?

- CA <u>not</u> bound by RvJ

- The decision in Roberts v Johnstone is merely "guidance" – how to comply with legal principle of fair and reasonable compensation without over-compensation

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D has a bad day in court…

C cannot show she has suffered a net loss?

Experts…

Economists

"I accept from Dr Llewellyn's evidence that it is no longer a "safe prediction" that property prices will rise or even hold their value over the ensuing decades" [100]

Actuaries

"Ms Angell herself emphasised that this method does require the input of a significant number of assumptions which are uncertain and rely on expert judgment." [111]

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D has a bad day in court…

"As Mr Daykin put it in cross-examination, one cannot constrain the value of the portfolio without affecting the discount rate. The obligation to make such an investment "would…require the discount rate assumption to be revisited to allow for very low effective return on that part of the compensation for 35 years or more, which would significantly increase the calculated amount of compensation required." [129]

IFA

"The "cash flow model" was dependent on the ability to release capital. In the case under appeal there was simply no evidence of a mechanism to release such capital when this appellant was nearly 80 years of age." [134]

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Swift v Carpenter

Irwin LJ [140]

It is my view that, in the context of modern property prices and a negative discount rate, the formula in *Roberts v Johnstone* no longer achieves fair and reasonable compensation for an injured claimant. In my view, it cannot be regarded as full, fair or reasonable compensation to award nil damages in respect of a large established need, on the basis that, if all the relevant predictions hold good over many decades to come, there will arise a windfall to a claimant's estate.

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Swift v Carpenter

Irwin LJ [146]

I recognise the need to avoid a windfall to the claimant's estate, if that can be achieved without prejudice to the cardinal principle of fair and reasonable compensation. But to withhold all damages for the purpose of avoiding an eventual windfall seems to me to put a secondary principle before a primary principle: to put the cart before the horse

Swift v Carpenter

Irwin LJ [148]

"This Appellant showed at trial she has a need for £900,000 which can only be awarded as a lump sum. Is that to be withheld in total because of a potential capital windfall, very probably to her estate after her death, which will not be valued until then? My answer is no. Such an outcome does not represent fair or reasonable compensation.

Swift v Carpenter

Irwin LJ [148-9]

"I fully accept that a windfall should be avoided if at all possible, even if it means a not insignificant reduction in the award. Here the parties have a measure of agreement. Depending on the answer to two questions, they agree that the proper approach is now to establish as best as possible the value of the reversionary interest in the incremental part of the property to be purchased."

The "unviable alternatives"

(1) Interest only mortgage for life backed by PPO?

    – no such product

(2) Life multiplier x mortgage interest / rental? – award > capital value (in Swift)

(3) Loan from D + charge on property?

    – insurers not appropriately regulated … (+ C not wanting to be bound to D?)

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Swift v Carpenter

Irwin LJ [149]

> The second question is whether the Appellant's argument that there should be no reduction to reflect the windfall should be rejected.   My answer to that will depend on whether a valid and reasonably workable approach can be reached to establishing the current value of such a windfall.

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The current value of the reversion?

More experts…

The "market" approach **6.6%**

The "fair and reasonable" approach (rental/investment returns) **c.3%**

Irwin LJ [200]:

I fully recognise that the existing market in reversionary interests is very small. However, <u>I have no doubt that a market approach must in principle be the correct way to value a reversionary interest</u>…

…doing the best that I can, … a discount rate of **5%** is appropriate.

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The financial result

Lambert J:

But for property £1.450M

Property required£2.35M

Difference = £900k

Nil award But for property

CA:

Present value of reversionary interest =

£900k x $1.05^{-45.43}$ = £98,087

Award = £900k - £98,087 = £801,913 (=89% of capital)

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The maths

[No actual formula in the judgment…]

$R = (SA - EP) \times 1.05^{-L}$
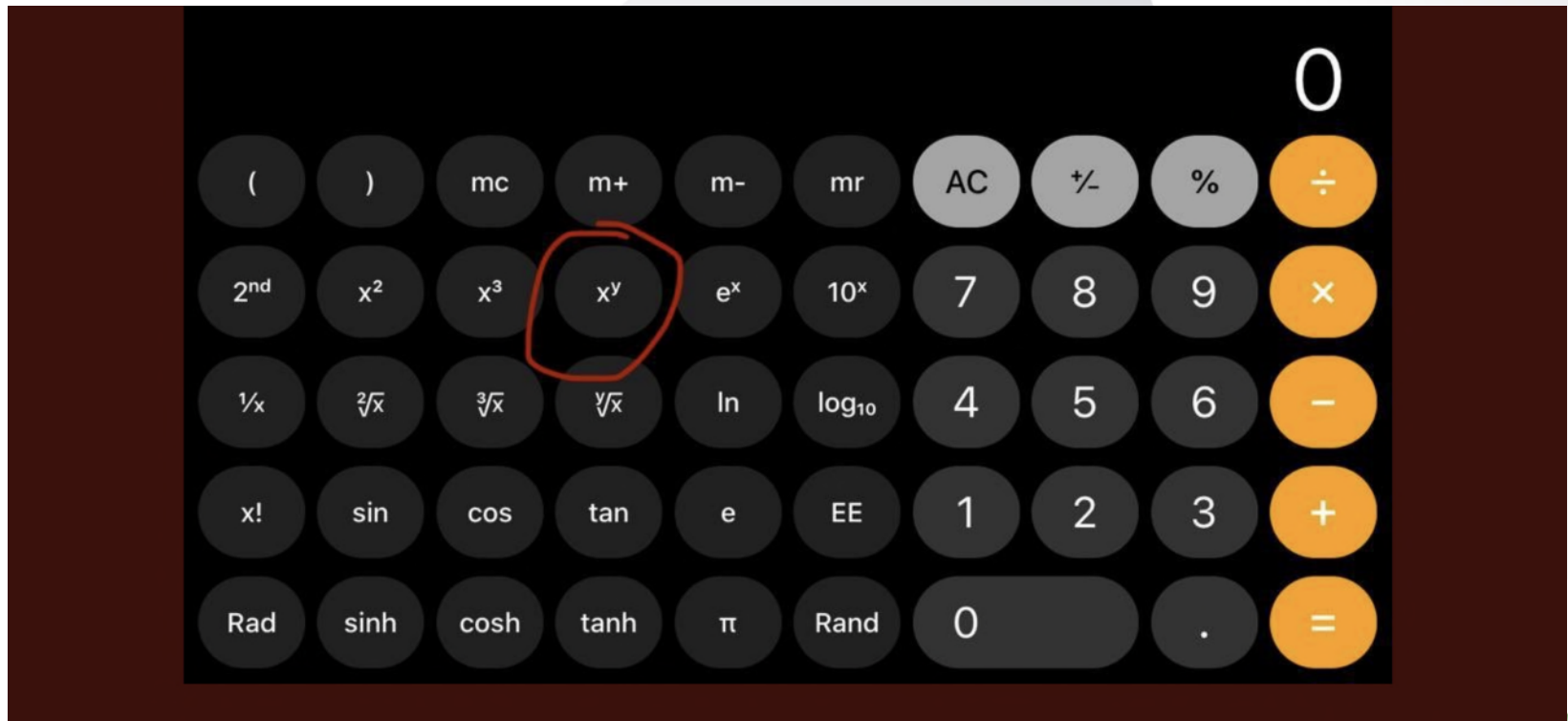
R = Reversionary value

SA = special accommodation

EP = existing property

L = life expectancy (T2, 0%)

Aimed to calculate the sum in todays money which will grow at 5% pa into the value of the windfall.

£98,087 + 5% pa for 45.43 years = £900k
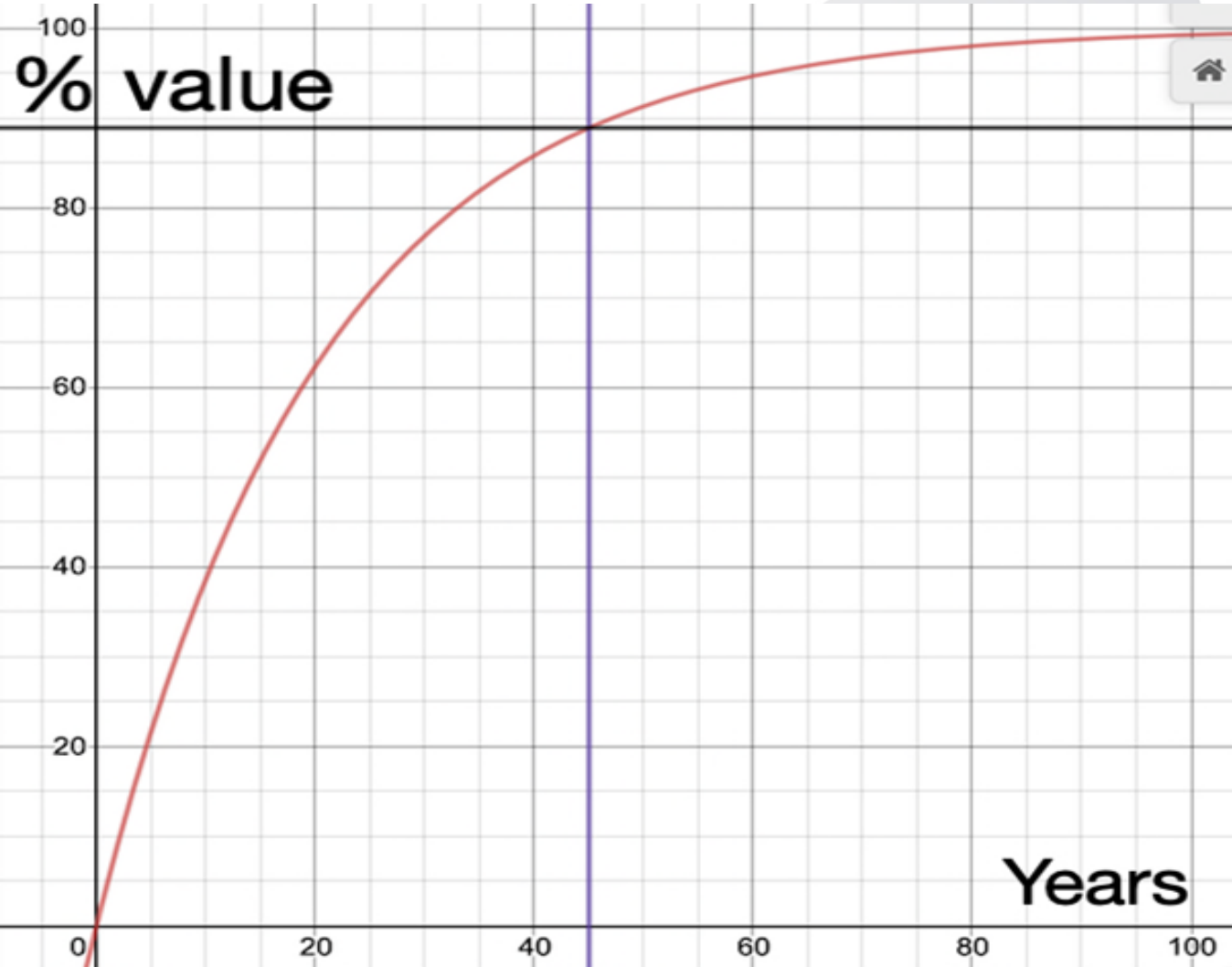
900000 x 1.05 [X^y]-45.45 =

Beware para [170]?

"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…"

But award is based on use of T1/2 at 0% (in a life multiplier case) "treated as" a term certain.

In other (non-life) cases use the number of years.

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5% rate of return – what does it look like?

Exceptions to the new "guidance"?

Irwin LJ[210]

I accept the submission of the Intervener that this guidance should not be regarded as a straitjacket to be applied universally and rigidly. There may be cases where this guidance is inappropriate. However, for <u>longer lives</u>, during <u>conditions of negative or low positive discount rates</u>, and <u>subject to particular circumstances</u>, this guidance should be regarded as enduring.

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Exceptions to the new "guidance"?

Irwin LJ [171]

It may be that different considerations and arguments could be applied to that category of case [paradigm 3 – 7 year life expectancy]. I make no further comment on that and should not be understood to express a view on it.

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Exceptions to the new "guidance"?

Underhill LJ [222]

I would add that I agree with Irwin LJ that guidance of this character should only be revisited in response to really significant changes, and in the case of appellate guidance (which it generally is) <u>it will rarely if ever be right for that guidance to be departed from by a first-instance court.</u>

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Battles ahead?

Leave to appeal to the supreme court:

D has applied:

- Departure from RvJ
- Rejection of cash-flow model
- Method of reversion valuation

- Hearing on/after 23.10.20

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Battles ahead?

Short life expectancy cases?

Expressly excluded from Swift

But what is a "short life" case?

- Paradigm 3 – 7 years?
- No line in the sand?
  - 70 year old with 7 year Lx
  - 10 year old with 7 year Lx
  - $500k \times 1.05^{-7} = 355k$ D = 145k
  - "subject to particular circumstances"

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Example 1: Split calculations

Child brain injury

Age 10 at injury

Age 20 at trial

Lx to age 50

Would have moved out at age 30 and purchased family home at age 35 for 300k jointly 50:50 with partner

Now needs £750k property

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Example 1: Split calculations

(a) <u>Ignore the delay in injecting capital</u>

Reversion value =

(£750k-£150k) x 1.05^{-30} = £139k

Damages = (£750k-£150k) -£139k = **£461k**

(b) <u>Split the reversions</u>

R1: (£750k-0) x 1.05^{-15} = £360k

R2: (£750k-£150k) x 1.05^{-15} = £289k

Damages = (£750k-£150k)-£360k-£289k =**£49k**

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Example 1: Split calculations

(c) <u>Split the purchases</u>

R1: (£750k-0) x 1.05^{-15} = £360k

D1 = £750k-£360k = <u>£390k</u>

R2: (£750k-£150k) x 1.05^{-15} = £289k

D2: = (£750k-£150k) - £289k = <u>£311k</u>

Damages = £390k + £311k =**£701k**

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(d) <u>Add weighting to the injected capital</u>

Reversion value =

(£750k-(£150k÷2)) x 1.05^{-30} = £156k

Damages = (£750k-<u>£150k</u>) -£156k = **£444k**

Example 2: Acceleration

C, who lives in a £150k house, needs bungalow at age 40 (trial) costing £300k

Would have needed a bungalow at age 75 in any event

R = (£300k-£150k) x 1.05^{-35}= £27,194

D = £300k - £150k - £27,194 = £122,806

Is this right? C would have bought anyway…

Contrast accelerated operation costs…

Example 2: Acceleration

How to deal with same scenario when need arises at age 50 (10 years from trial) – simply 1.05^{-25}? Do we inflate by T.35 (T.27) – 10 year period of deferment? 1.0253 ?

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Example 3: Betterment

£750k property needed.

Current property worth £150k.

Life expectancy = 30.

Betterment value (after adaptation) £50k

No credit:

R = (£750k-£150k) x 1.05^{-30}=£139k

D = £750 - £150k - £139k = **£461k**

Credit:

R = (£750k + £50k -£150k) x 1.05^{-30}=£150k

D = £750 - £150k - £150k = **£450k**

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Example 4: Renters

C needs £350k special accommodation

L = 30 years

Rent at £600 pcm = £7,200 pa. x 31.16 = £224k

(£350k-£224k) x 1.05^{-30} = £29k

D= £350k-£224k-£29k = **£97k**

Or?

(£350k - £0) x 1.05-30 = £81k

D= £350-£81k-£224k = **£45k**

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