

#COURTOFPROTECTION

Welcome

Court of Protection

From Litigation to Deputyship

SH ∞ SMITHS



Introduction

Connect with your hosts on LinkedIn by scanning the QR codes below.



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Agenda

Time	Topic	Speaker(s)
10:00 - 10:20	Welcome & Intro	Sue Bowler & Lucy Taylor, Shoosmiths
10:20 - 11:00	Litigation Masterclass	Denise Stephens, Shoosmiths
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Litigation Masterclass



Denise Stephens
Partner

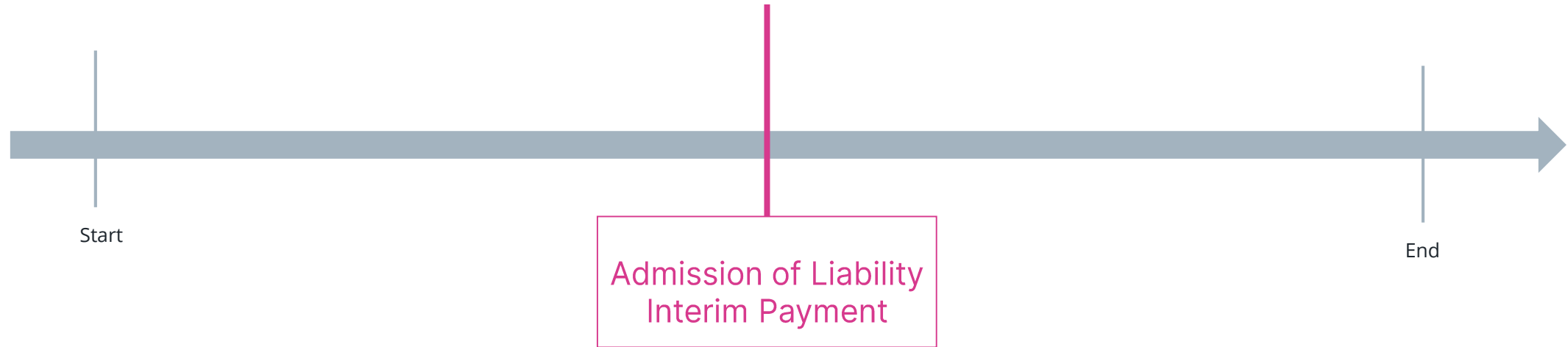
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We are halfway there.....



Important People



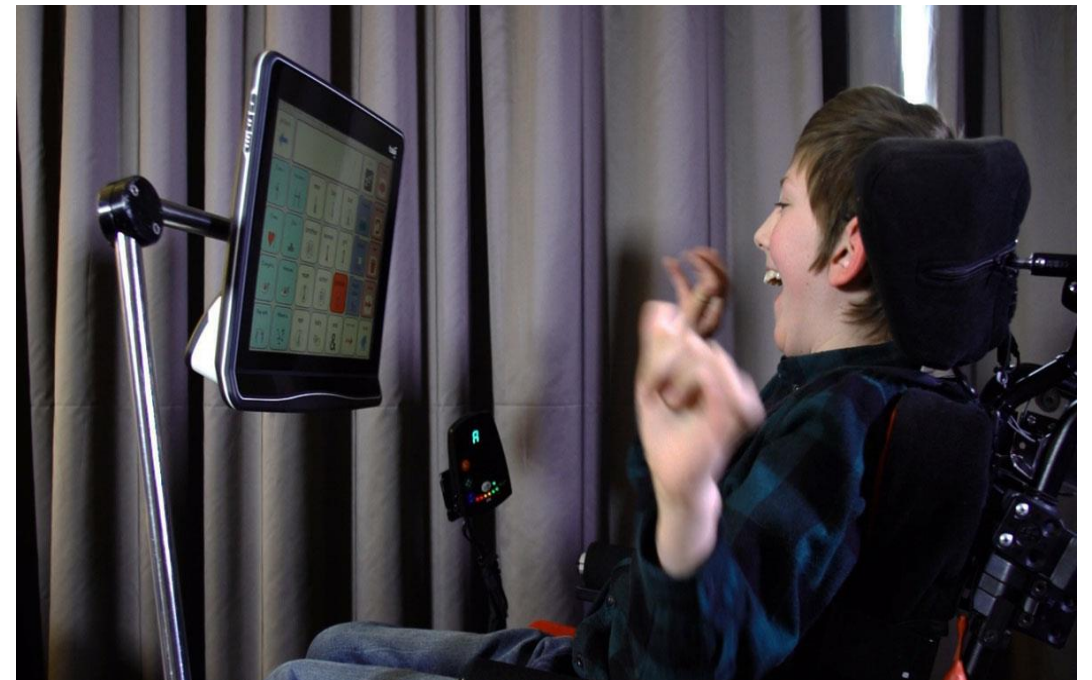
James Robshaw (a child by his mother and litigation friend Suzanne Adams) v United Lincolnshire Hospitals NHS Trust [2015] EWHC 923 (QB)

Leading case on quantum

Highest court award

Set a precedent for a number of firsts

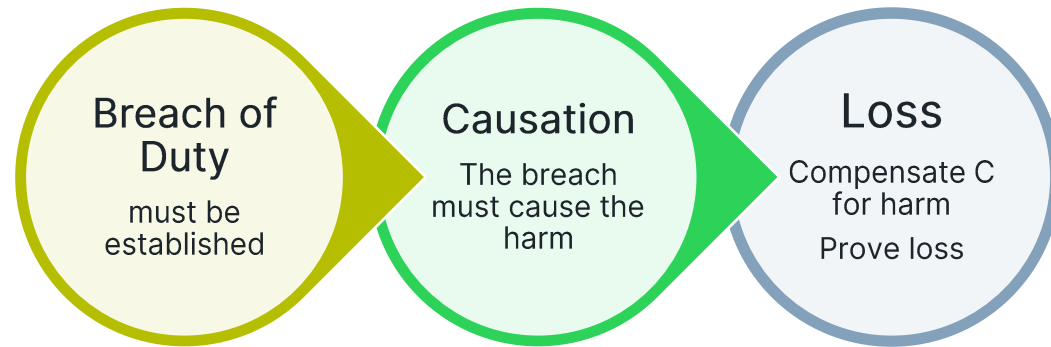
Litigation Solicitor and Deputy – Denise Stephens



Capacity - Litigation Friend

- CPR 21 – Court rules for Claimants who lack capacity
- CPR 21.2 – A *protected party* must have a litigation friend to conduct proceedings on his/her behalf
- A “protected party” means a party who *lacks capacity* to conduct proceedings.
- “Lacks capacity” is defined as lacking capacity within the meaning of the *Mental Capacity Act 2005* (MCA)
- MCA s2.1 “A person lacks capacity in relation to a matter if at the material time he is *unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain*”
- Capacity is decision specific

Legal basis for claim (1)



Q: What Duty?

A: The duty to provide a proper standard of medical care

Q: Who owes the duty?

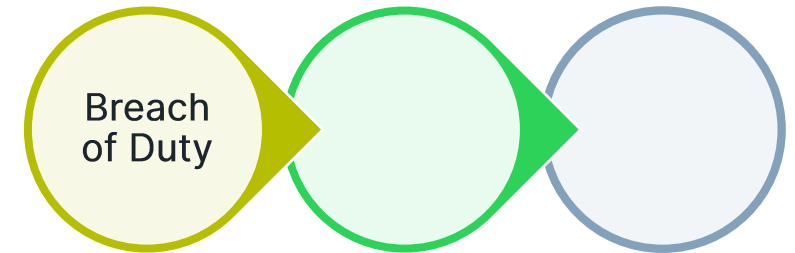
A1: Private Health Providers

A2: Institutional Health Providers – vicarious liability and direct liability

Q: How is the duty derived?

A: Tort and Contract

Legal basis for claim (2)



What is the standard of care?

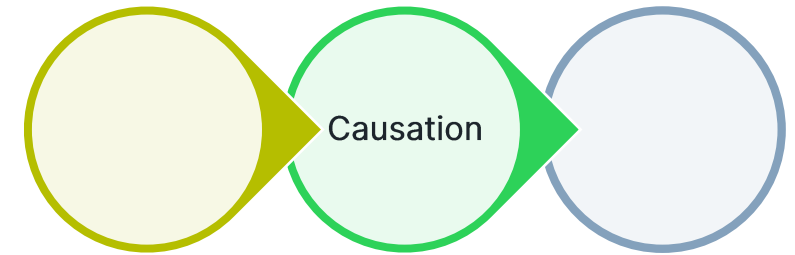
“[The doctor] is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art... Putting it the other way around, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view.” Bolam v Friern HMC [1957] 1 WLR 582

- Specialism dependent
- Location dependent (access to tests)
- Time dependant (medical knowledge at the time)
- But not experience dependent – Wilsher v Essex Area Health Authority [1987] UKHL 1
- Demonstrate opinion has a logical basis - Bolitho v City of Hackney Health Authority [1997] UKHL 46

Consent: Part of duty to provide medical care is the duty to inform the patient of risks.

“A doctor is under a duty to take reasonable care to ensure that the patient was aware of any material risks involved in the treatment and of any reasonable alternative or variant treatments’ - Montgomery v Lanarkshire Health Board [2015] UKSC 11

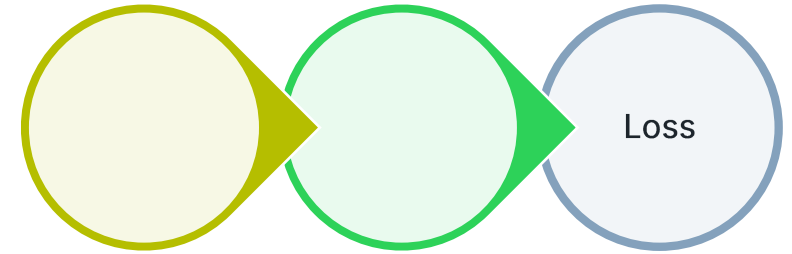
Legal basis for claim (3)



The 'But For' test

- No civil liability for negligence that does not cause harm.
- The person bringing the claim for compensation must prove that 'on the balance of probabilities' the negligence caused the harm.
- 'Harm' means any physical or psychiatric injury, or death, and the financial consequences of that injury or death.
- In the vast majority of cases, this issue is resolved by applying the "but for" test, namely, whether, on the balance of probabilities, the injury would have occurred but for the Defendant's negligence.
- If there are multiple cumulative causative factors, only one of which is the negligent cause, it may be impossible for the court to apply the but for test. In such cases, the court considers whether the contribution of the negligent cause was a material contribution

Legal basis for claim (3)



Compensation is known as 'damages' in the court system

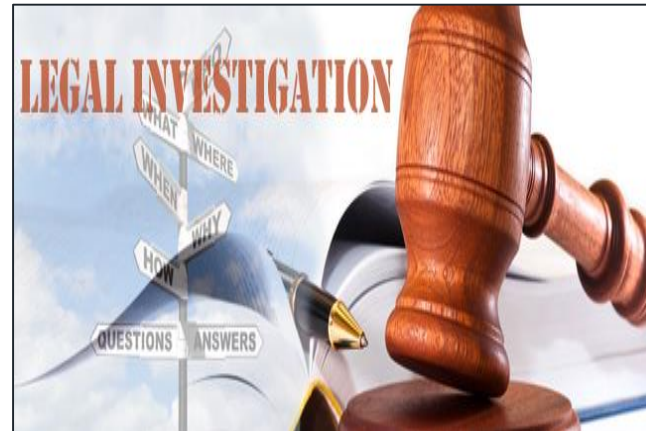
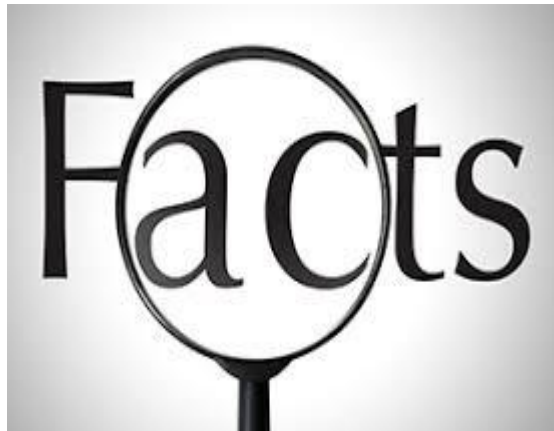
It is intended to repair the harm, as best as money can

Falls into three categories:

- Damages for the injuries themselves
- Losses and expenses Claimant incurs as a result of the injuries up to trial
- Consequential losses and expenses Claimant will suffer in the future

Quantum covered in more detail by Kashmir Uppal in a later session

Establishing if there is a claim



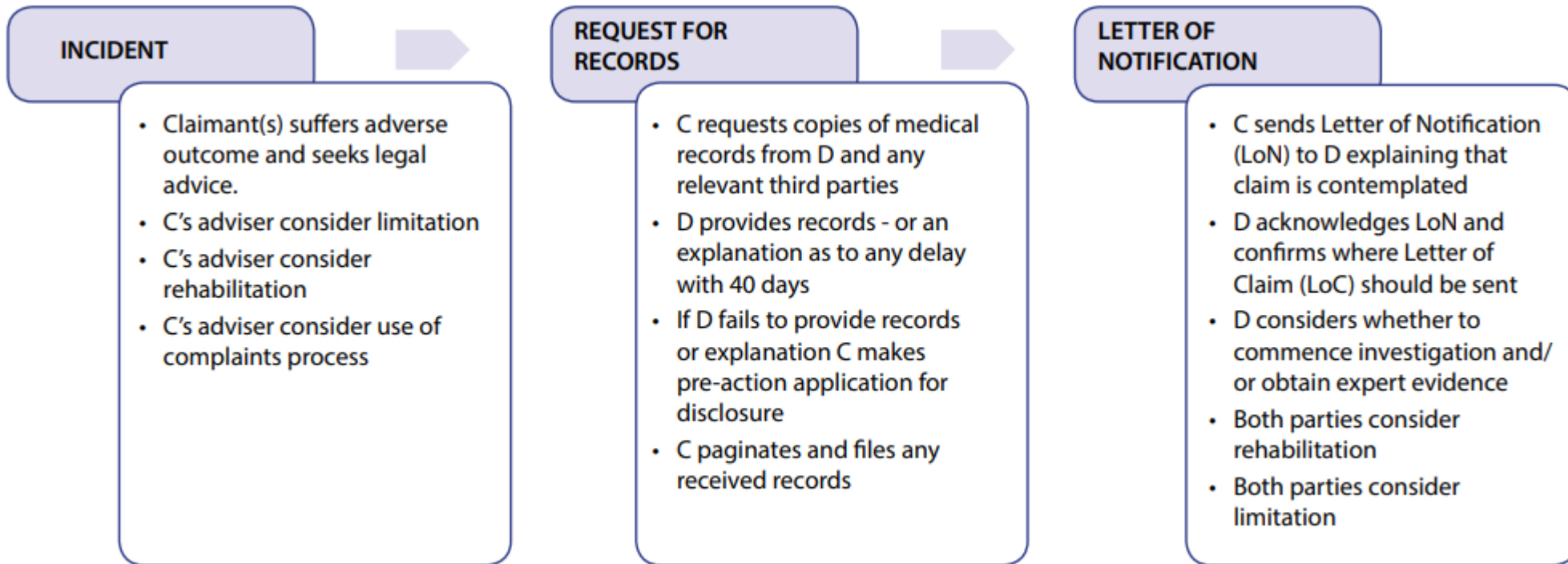
Pre-action Protocol

Protocols introduced to encourage parties to settle before issuing a claim

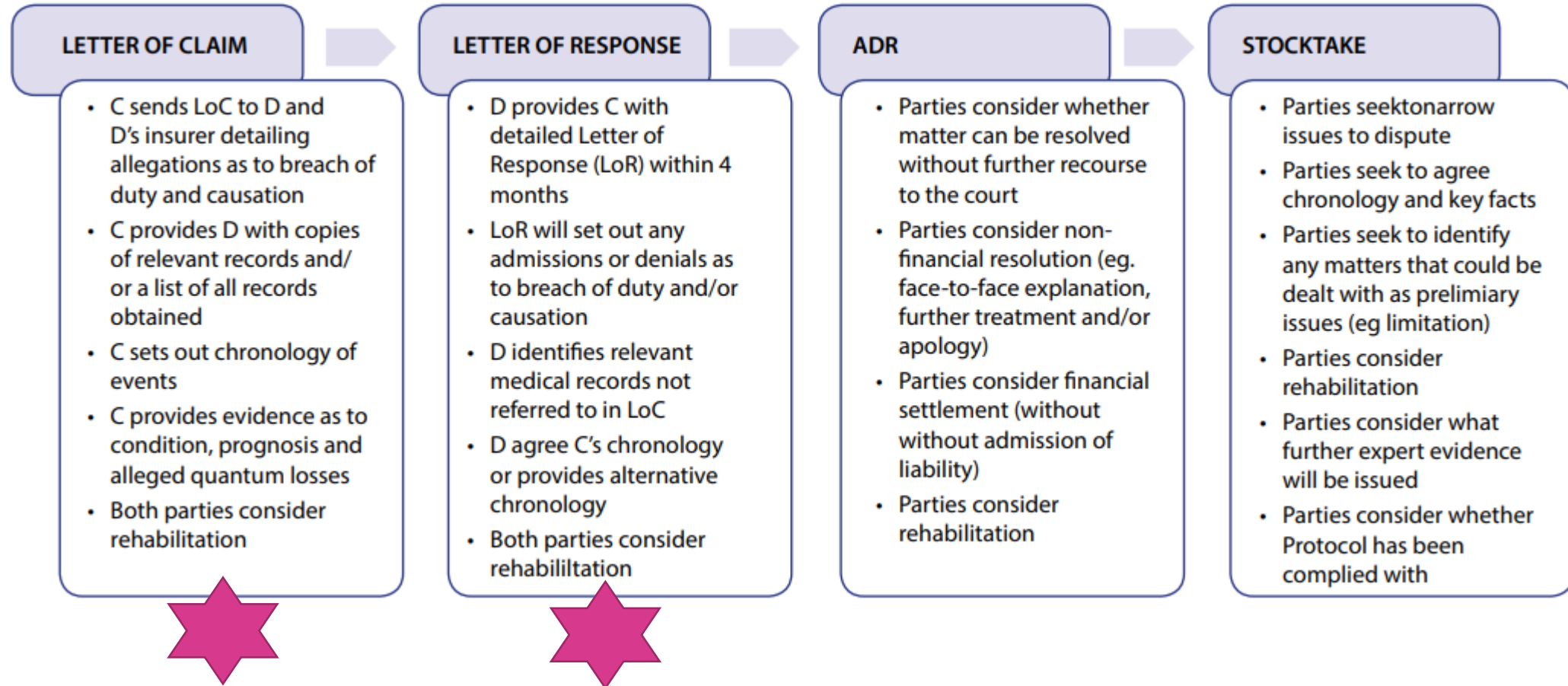
A number relevant to personal injury cases:

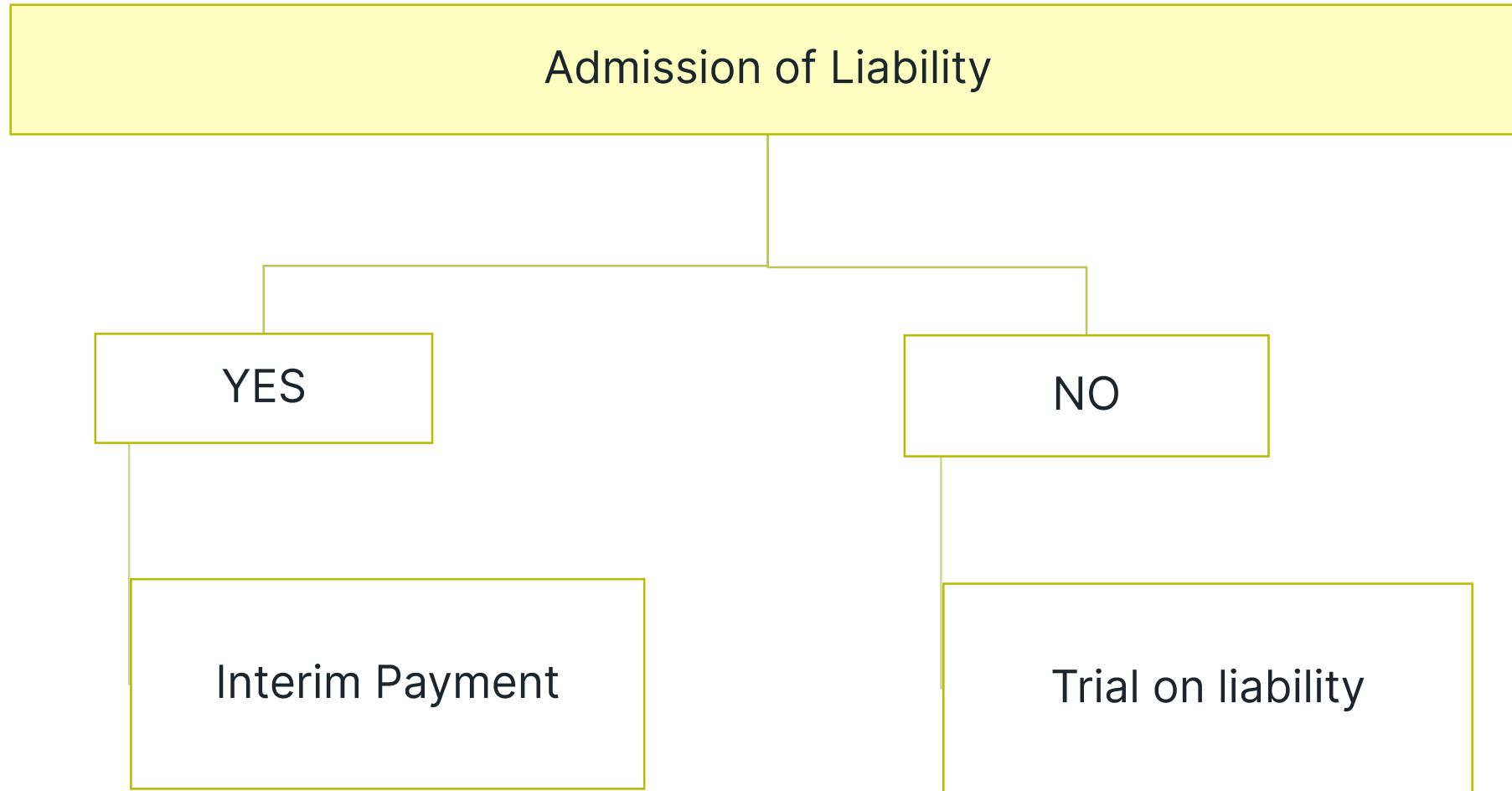
- Practice Direction – Pre-Action Conduct and Protocols – applies to all pre-action protocols
 - Pre-Action Protocol for Resolution of Clinical Disputes
 - Pre-Action Protocol for Personal Injury Claims
 - Pre-Action Protocol for Disease and Illness Claims
-
- Pre-Action Protocol for Resolution of Clinical Disputes relevant in Robshaw
-
- Illustrative flowchart to show steps required to take

PRE-ACTION PROTOCOL FOR RESOLUTION OF CLINICAL DISPUTES – FLOW CHART



PRE-ACTION PROTOCOL FOR RESOLUTION OF CLINICAL DISPUTES – FLOW CHART





Change of Solicitor



APPOINTMENT OF CASE MANAGER

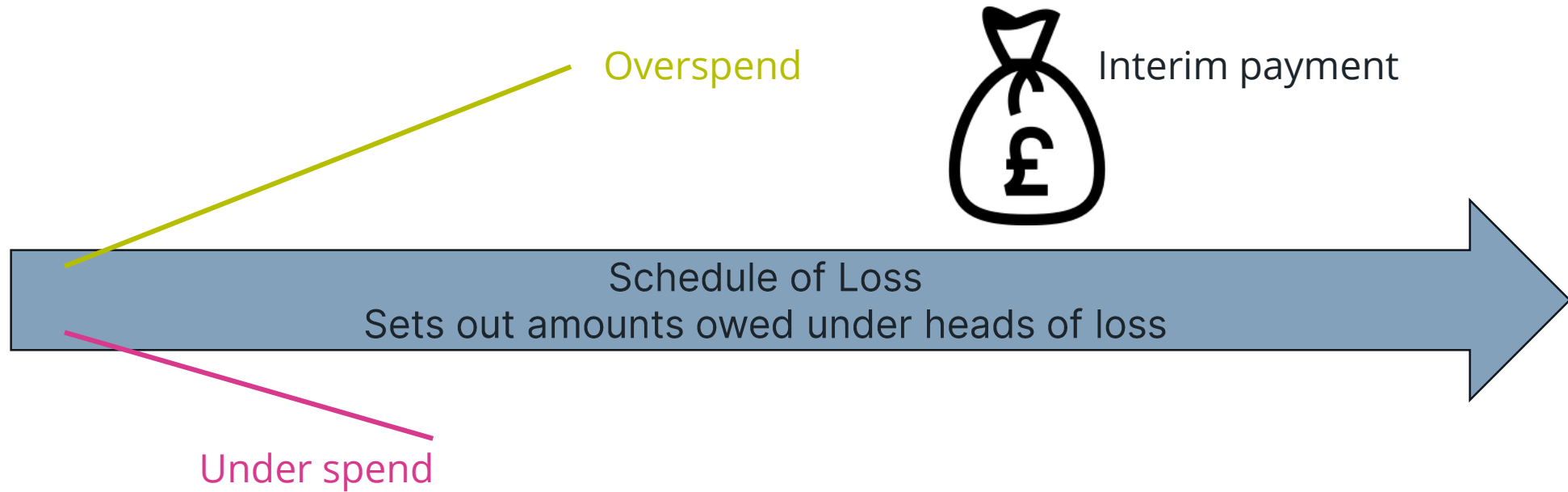
- Carers
- Therapists



Being an advocate

- Equipment
- Eye-Gaze
- Accommodation
- Education – differentiating the curriculum – claim for teacher and assistant
- Tribunals
- Swimming Pool
- Kontiki Motor-home

Proving the loss



NHS v Private

s2 of the Law Reform (Personal Injury Act) 1948

“(4) In an action for damages for personal injuries (including any such action arising out of a contract), there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under [the National Health Service Act 2006 or the National Health Service (Wales) Act 2006] or the National Health Service (Scotland) Act 1947 or of any corresponding facilities in Northern Ireland”.

Peters v East Midlands [2009] EWCA Civ 145

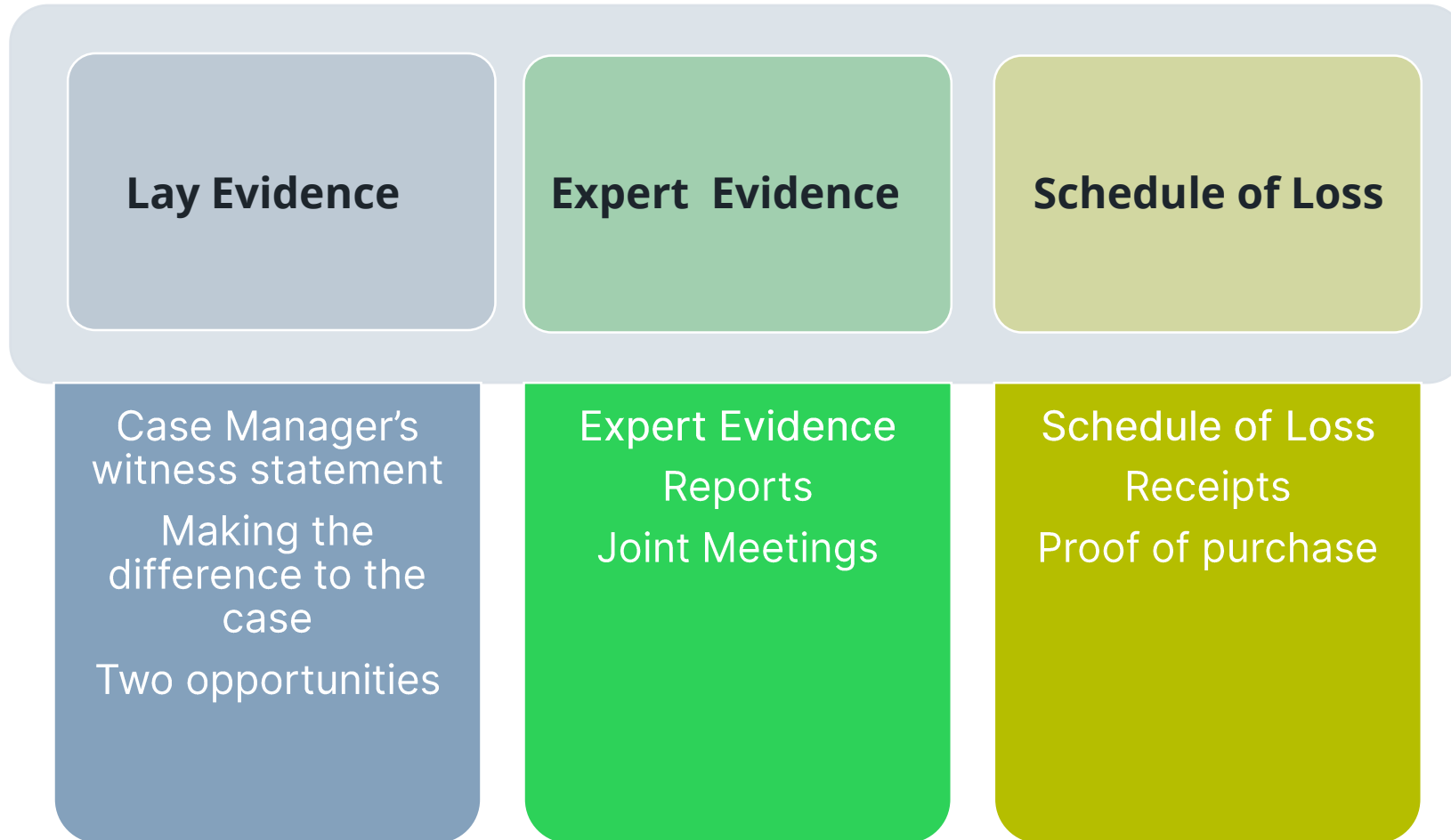
The Court of Appeal held that that there was no reason in policy or principle why a claimant who wished to opt for self-funding and damages in preference to reliance on the statutory obligations of a public authority should not be entitled to do so as a matter of right, provided there was no double recovery. Further, where the court had ordered a [defendant] to pay 100 per cent of the care costs necessary to meet a claimant’s needs, there was no duty on a case manager to seek full public funding.

Disclosure

1. Carers' Records
2. Case Manager's contact notes
3. Redacting
4. 91 lever arch files



Evidence



Case Manager's role

Support family through litigation



Keep in contact with Litigation Solicitor



Conferences

Conference with Counsel
Conferences with Experts
Round-table meetings

Privilege entitles a party (or their successor in title) to withhold evidence from production to a third party or the court. This evidence may be either written or oral.

- The privilege belongs to the client, and the client's lawyer is under a professional obligation to assert the privilege until it is waived by the client.
- Litigation privilege arises when litigation is pending or contemplated
- Supports the principle that a litigant or potential litigant should be free to seek evidence without being obliged to disclose the result of their research to their opponent.
- The privilege applies to communications between a client or the client's lawyer and a third party.

Round Table Meeting



Settlement or Trial?

Trial

1. Run up to trial
2. Preparation for the big day
3. Start of the trial
4. Case manager in the witness box



Settlement or Judgment?

Infant Approval Hearing

Breakdown of James's damages:

- Periodical payments
- Lump Sum
- Order

Kashmir Uppal will be explaining court's approach in Infant Approval hearings in more detail later today.

Receipt of Damages

Listen to James' story in this video:



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Case Management

Tips & Pitfalls For Running An Effective Multi-disciplinary Team



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Funding for INA/case manager

- Compensator – insurers/public body
- Liability/causation – can take much longer in clinical negligence cases
- Rehabilitation Code - purpose is to “help the injured claimant make the best and quickest possible medical, social, vocational and psychological recovery”
- Personal Injury and Clinical Disputes Protocols – The claimant and the defendant shall both consider as early as possible whether the claimant has reasonable needs that could be met by rehabilitation treatment or other measures. They should also discuss how these needs might be addressed
- Interim payments

Rehab code – medium, severe and catastrophic injuries

- rehabilitation assistance will be considered by “immediate needs assessment” (INA) carried out by a case manager or rehabilitation professional
- claimant’s solicitor and compensator should discuss at the outset an appropriate person to carry out the INA and their instructions/method of assessment eg a joint referral, subject to the claimant's approval
- parties should seek to agree early implementation of reasonable recommendations and secure funding
- with catastrophic injuries it is especially important to achieve good early communication. The INA should be able to be carried out even if the claimant is an NHS in-patient

Rehab code - INA assessors

- parties cannot insist on a certain case manager if the other side have raised a reasonable objection within 21 days
- responsibility of commissioning the provider is ultimately the claimant's as long as they can show co-operation
- assessor's overriding duty is to the claimant and they should act completely independently from their instructing party
- the assessment may be carried out by someone who has a business link with the parties' representatives only with agreement from the other side
- the assessment should reveal information and analysis which maximises the claimant's recovery and mitigates loss

Choosing case manager

- Usually by litigation solicitor or Deputy – do not be “bullied” by the Defendant
- Relevant experience/expertise
- Availability
- Regulatory compliance - CQC is required by section 10(1) of the Health & Social Care Act 2008 (the Act) which states that:
 - ‘any person who carries on a regulated activity without being registered under this chapter in respect of the carrying on of that activity is guilty of an offence’

A list of ‘regulated activities’ is set out in Schedule 1 to the Health & Social Care Act 2008 (Regulated Activities) Regulations 2014 and includes personal care.

Immediate Needs Assessment - Rehab Code

- the assessment should be conducted entirely outside the litigation process, unless parties agree otherwise in writing
- the INA, report and related correspondence will be deemed privileged unless the parties agree otherwise. Anyone involved in the assessment process will not be a compellable witness

MDT

- Case manager
- Solicitor – litigation and/or Deputy
- Neuropsychology/neuropsychiatry
- Physio
- OT
- SALT
- Support workers
- Anyone else relevant?
- Consider the possibility that the closet clinician might not be the best

MDT considerations

- Suitability and relevant experience both in their field and in case management work
- Availability
- Any sub specialisms?
- Cost including consideration for travel- COVID has made us all adapt and embrace new ways of working, utilise statutory services where possible
- Right “fit” for the client/family?
- Establishing good working relationship with members of the MDT
- Co-ordination of MDT and review of rehab plan is essential
- Be clear in the instructions what is expected of MDT especially in relation to arrangements for funding
- Case manager should create and lead a cohesive MDT to provide holistic rehabilitation

Funding

- Understand the funding available and any limitations, give realistic cost estimate
- Monitor and work within estimates
- Understand when and how can more funding be obtained if needed
- Notify instructing solicitor well before estimate is exceeded
- Provide revised estimate and reasons
- If estimates are exceeded without authority there may be insufficient funds
- The needs of the client should be at the heart of the selection process for the MDT
- Communication from MDT to Case manager and onto the solicitor/insurers essential

Assistance for funding of MDT

- Section 2(4) of the Law Reform (Personal Injuries) Act 1948 requires the courts, in determining the reasonableness of the expenses, to disregard the possibility of treatment/therapies etc being available on the NHS
- CHC
- Adult Services
- Children's Services
- Disabled Facilities Grant

Notes

If the litigation is ongoing ALL therapeutic and case management notes are disclosable documents – to Court, experts, all parties

Keep separate privileged notes for discussions relating to the litigation

Do not mix litigation and therapeutic matters together in emails

Be cautious about email and notes content

Solicitors should give clear instructions about what material is privileged

Things Change!

- Changes with physical or psychological health of client
- Family dynamics or support changes
- Members of MDT leave and new ones join
- Initial goals not being met
- Different priorities for client, MDT, and instructing parties
- Disagreements
- Safeguarding
- Whatever happens the client should be at the centre of their journey
- Don't be afraid to advocate for well being of the client
- The “curved ball”
- Communication, communication, communication- its good to talk!

Case Study - Charles

- RTA aged 50 2017
- Passenger – multiple vehicle impact
- Close family member main cause of accident
- Severe brain injury and multiple orthopaedic injuries
- Pre-existing physical and mental health issues
- Discharged from acute NHS care with limited support
- Unable to deal with letters so fell through rehab follow up completely
- Depressed, anxious, suicidal, daily living was a huge burden
- Defendant's insurers and solicitors very slow
- Small interim payment
- Appointed psychologist, OT, physio – August 2018

Case Study - Charles

- Finally case manager agreed for INA
- Several more months for case manager appointment November 2018
- Rehab plan and goals in place January 2019
- But progressive physical deterioration, became very frail
- Much debate about cause of deterioration
- Therapies withdrawn
- Plan changed to maintaining quality of life rather than rehab July 2020

Case Study - Charles

- Continuously increased and changed the care provision as deterioration accelerated
 - Worked with NHS extensively – GP, dietician, hospital ward, consultants
 - Referred for CHC fast track assessment
 - Palliative care team brought in consultant and District Nursing team
 - Transfer to hospice as client's preferred place of care
 - Worked with hospice staff
 - Died December 2020
-
- Not the outcome anyone expected 2 years ago, but the best that could be provided for the client in conjunction with their wishes
 - Constant monitoring, review, communication and flexibility were key

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Adding Value & Settlement Considerations



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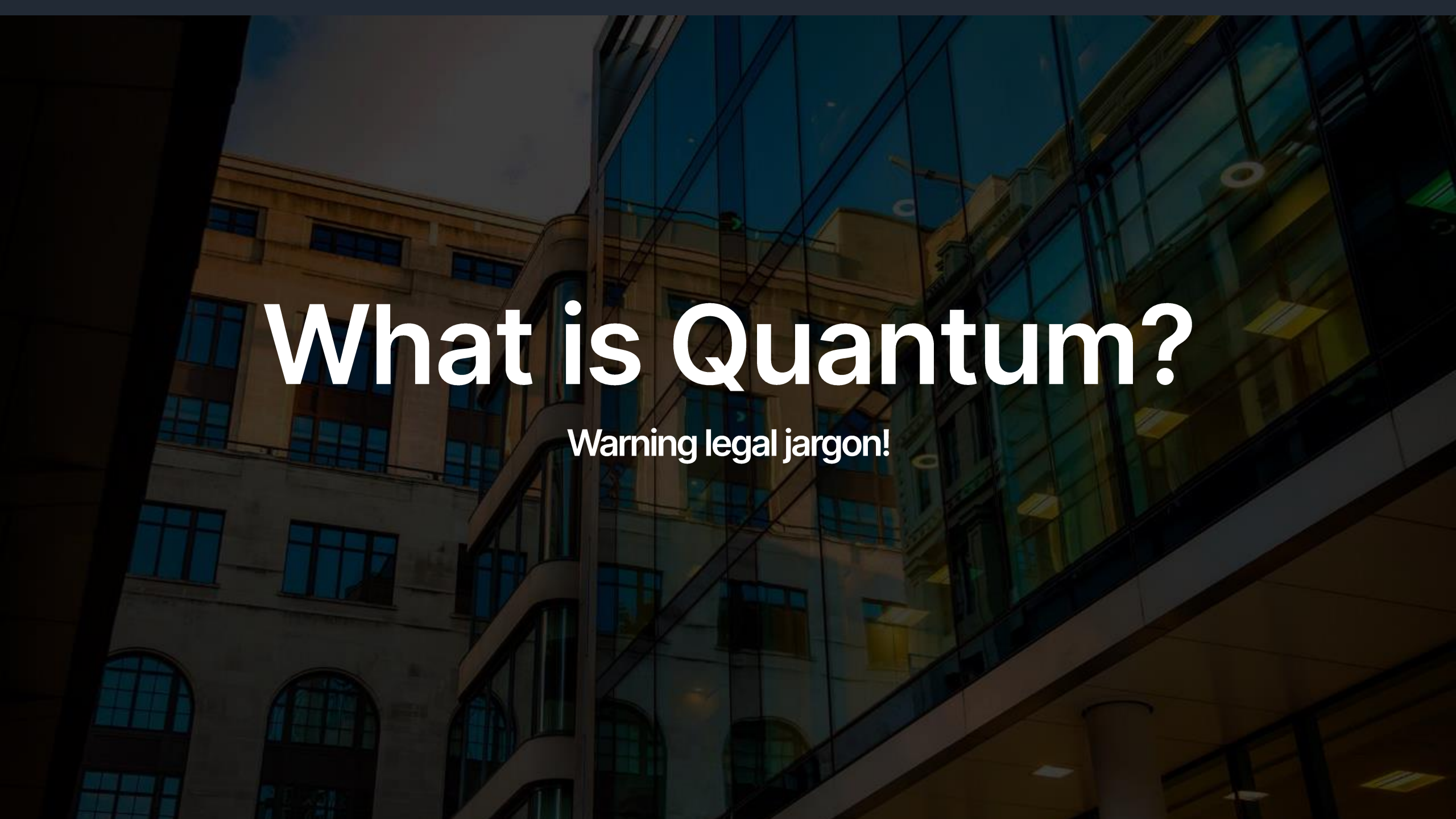
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Agenda

1. Quantum
 - Legal and practical requirements
 - Evidence
 - Court approach
2. Case Study
3. Settlement
 - What is an acceptable figure
 - The Approval Hearing

A low-angle photograph of a modern glass skyscraper reflecting a traditional stone building. The glass reflects the sky and the other building, creating a complex pattern of lines and colors. The overall tone is dark and moody, with a blue and grey color palette. The text is overlaid in the center of the image.

What is Quantum?

Warning legal jargon!

“The overall aim of compensatory damages for tort is to place the claimant, so far as money can achieve this, in the same position as she would have been in if she had not suffered the wrong for which she is now being compensated” *Livingston v Rawyards Coal Co*(1880) 5 App Cas 25, 39 (Lord Blackburn).

“..the principle is that “full compensation” should be provided, for both financial and non-financial losses”. *Heil v Rankin*[2001] 2 QB 272 (Lord Woolf)

“Claimants must understand that if they bring actions for damages it is for them to prove their damage, it is not enough to write down the particulars, and, so to speak, throw themselves at the head of the court saying ‘This is what I have lost. I ask you to give me these damages’. They have to prove it.” *Bonham Carter v Hyde Park Hotel* [1948] 1 WLUK 36

Basic principles Court will apply



The Schedule of Loss

1. Key document
2. Aim is to provide a range of figures which represent the loss and expense caused by the injuries which the claimant has suffered
3. Must have clarity and credibility
4. Structure is important
 1. Set out the basic facts on first page (no more than 2 pages at most)
 2. Isolate each individual head of loss (sometimes called heads of damage)

What does Head of Loss mean?

Heads of Loss

General Damages

Compensation for
pain, suffering and
loss of amenity
(PSLA)



Often calculated using
previous cases with a
similar injury.

Consider:

Length of time the
claimant is in pain

The effect it will have on
the claimant's personal
life



Examples

the unnecessary suffering, for
days, weeks, months, or
permanently

the residual impact on an
individual's life eg:

Loss of love and affection

Loss of enjoyment – holidays
and leisure time

Heads of Loss

General Damages for future loss

Compensation for
future financial
losses and
expenses



Calculated
depending on the
claimant's ability to
work or continue
studying. This
becomes more
complicated for
claimants who are in
education or self-
employed as there is not
a fixed income.



Considerations:
nursing care or therapies
special equipment such as
prosthetic limbs which need
to be replaced every few
years
injured people may no longer
be able to perform the same
jobs they did before, if they
can work at all
missed career or educational
opportunities - promotions,
new projects or other
delayed/lost advancement.

Heads of Loss Special Damages

Compensation for expenses, expenditure and other financial (pecuniary) losses to the date of trial

eg: past losses capable of relatively precise financial computation



Calculated using a record of expenses incurred from the moment of the injury until the case is settled



Examples:

- Loss of earnings
- Clothing and personal effects
- Medical care & expenses
- DIY, gardening and housework services
- Aids and appliances
- Alternative/adapted accommodation
- transport

Schedule of Loss - Sources of Evidence (1)

1. Witness evidence

- Claimant's family life and social life, hobbies, health, work and ambitions before the facts forming the basis of the claim took place. How do you do this for someone affected from birth?
- Where the claimant believes her life and work would have gone but for the negligence
- The injuries that have been sustained by the claimant and the impact that this has had upon her life
- The losses and expenses that have been incurred and will continue to be incurred into the future
- Supporting Witnesses – family or work colleagues to deal with certain heads of loss eg care and assistance or promotion prospects
- Importance of the diary

Schedule of Loss - Sources of Evidence (2)

2. Supporting documentation / paperwork
 - Earliest opportunity keep all receipts, invoices, wages slips etc
 - Keep a diary or spreadsheet of items on a daily/weekly basis
3. Medical Evidence
 - Any claims made in the schedules of loss must be supported by medico-legal expert

When do we start looking at Quantum?

Personal injury

Capture information

Accident occurs. Legal advice is sought
C sends letter of claim. D passes to Insurer
Rehabilitation Code Consider Rehabilitation as soon as possible.
D responds to Letter of Claim. Both parties continue Rehabilitation Code.
Parties nominate and instruction experts
Formally plead loss Both parties disclose Experts reports and C discloses schedule of losses.
Both parties consider ADR
Formally plead loss Issue and serve Claim and Particulars of Claim includes Schedule of Loss
Defence and Counterclaim
Disclosure
Witness Evidence
Expert Evidence
Trial

Medical negligence

Capture information

Adverse outcome occurs – legal advice is sought.
C requests copies of medical records from D and any relevant third parties
C sends letter of notification to D explaining claim contemplated.
Formally plead loss C sends Letter of Claim including chronology of events, relevant medical records and evidence as to condition prognosis and alleged quantum Both parties consider rehabilitation.
D responds to Letter of Claim. Both parties consider rehabilitation
Both parties consider ADR.
Formally plead loss Issue and serve Claim and Particulars of Claim includes Schedule of Loss
Defence
Disclosure
Witness Evidence
Expert Evidence
Trial

Formally plead loss

Formally plead loss



Case Study

Case Study “ABC” (1)

Date of birth: 1 June 2008

Mismanagement of ABC’s birth resulted in ABC suffering from bilateral symmetrical palsy affecting all four limbs, of predominantly spastic type with some evidence of dystonia.

Liability was established by extrapolating from ABC’s condition at birth, which was simply not consistent with the fetal heart recordings as noted in the medical records. Instead of CTG, a pinnard was used to monitor the fetal heart. The causation experts concluded that as he was born in such a poor condition with no obvious complications such as cord entanglement or shoulder dystocia, the only explanation for his condition was fetal distress which was not detected due to the negligent way the intermittent auscultation was carried out.

Case Study “ABC” (2)

1. Severity of cerebral palsy closest to Level V of the Gross Motor Function Classification System (GMFCS) – applicable to a child without independent rolling or significant floor mobility. Has better trunk and head control resulting in better sitting ability. Some ability to remain in unsupported sitting position.
2. Spasticity increased during childhood
3. Evolved some lower limb joint contractures and hip subluxation
4. Development asymmetrical posture of his lower limbs since undergoing hip surgery
5. Unlikely to be able to use a walking device for functional mobility although could use supported device for therapeutic benefit
6. Unsure if able to take standing transfers and will continued to need hoisting for all transfers
7. Tone will continue to increase during childhood and adolescence and require further interventions
8. Fine motor ability is likely to remain at the same level.

Case Study “ABC” (3)

9. Severe learning difficulties and microcephaly
10. Continue feeding orally into adulthood
11. Full time care
12. Speech is difficult to understand and this is likely to continue due to dysarthria and limitations on his verbal language development
13. Has epilepsy but has not experienced recurrence of seizures while taking medication
14. At risk of developing further orthopaedic bone and joint deformities requiring surgical intervention
15. Will always lack capacity to make decisions about his life affairs, litigation, treatment and care

Case Study - A breakdown of damages

Heads of Loss
Gratuitous Care
Private Care
Professional case management
Medical Treatment and therapies
Aids & equipment
Orthotics
Accommodation
Travel & Transport
Holidays & Leisure
Deputyship Costs
Education Costs
Loss of earnings, pension and benefits
Assistive technology

Case Study “ABC”

Treatment and Therapies

- Physiotherapy
- Speech and language therapy
- Occupational therapy
- Psychology
- Orthopaedic and Botox

Interim payment allowed care and therapies to be in place much earlier

Expert evidence supported care and therapies

GMFCS reduced to level IV.
Huge impact on ABC’s life.
Increased life expectancy to 70.

Case Study “ABC” Accommodation

- Expert opinion confirmed ABC required suitable accommodation to meet his needs and the needs of those caring for him
- At time of birth (June 2008) parents lived in a flat
- 9 months old moved into a two storey detached house with 3 bedrooms. Rented from Grandparents. Unsuitable for ABC’s long term needs
- December 2016 rented Property X that had already been adapted to meet the needs of another individual with disabilities so only required minor adaptation works to meet the longer term accommodation needs of ABC
- December 2017 able to purchase Property X after Interim payment - ABC 9 years 6 months old).

Allowed implementation of care and therapy regime which resulted in ABC making significant improvements in her medical and emotional condition.

Case Study “ABC”

Gratuitous care to Private care

- 24 hour waking night care
- ABC’s mother worked as nursery manager from Sept 2008-Jan 2014. Took ABC to work with her. Stopped work between Feb 2014 and Sep 2014. Returned to work Sept 2014. Gave up work Sept 2015 to look after ABC.
- Private Care regime started June 2017 (ABC 9 yrs)
- Level of ongoing Gratuitous care 7 hours per week until date of trial
- Expert evidence provided regarding value of care

Reduced care burden on parents.

Case Study “ABC” Education

- Education lawyer to help with education, health and care plan (EHCP) to ensure special education provision remains adequate and he receives the requirement support
- Annual reviews
- Include costs of appealing any decisions
- Tied in with ongoing therapies and assistive technology

Ensures ABC special education needs remain in place.

Case Study “ABC”

Loss of earnings, pensions benefits?

How to calculate when claimant is unlikely to work?

- Mother: did a BTEC National Diploma in Early Years Level 3 and 2 years at University training in midwifery and paediatrics. Manager of a Nursery before ABC
- Father: went to college and passed a computing course
- Likely ABC would have:
 - completed school and gone on to further education, achieving NVQ2 and NVQ3 qualifications
 - Achieved earnings equivalent to at least the average earnings across all employees in UK. Average between male and female
- Lost Years claim for loss of pension (difference between life expectancy and but for life expectancy)

Assist in calculating loss of earnings claim, more information from family better you can assess what the likely career path of the child might have been.
Included lost years claim as best position to assist with settlement negotiations



Settlement Considerations

To settle or not to settle?

1. Contrary to what people think aim is not to go to trial
2. BUT need to progress claim as if you are to ensure carry out appropriate investigations and keep pressure on defendants.
3. Don't accept all offers – needs to be at the right level.
4. What is the right level?
 - Schedule of Loss best position
 - Always a compromise
 - Bear in mind may need care for life
 - Litigation risk
5. Big figures may get claimant excited but need to remember damages may need to last for claimant's life.

Case Study: ABC settled at RTM

- Capitalised sum £22,184,625
- Lump sum £8.5 million
- Periodical Payments of £150,000 to age 19
- Periodical Payments of £252,500 from age 19 for life (70yo)
- Provisional damages
- Option to vary periodical payments

Settlement Approval Hearings

Where a claim is made on behalf of an individual who lacks capacity, whether a child or protected party, there are additional safeguards which involve judicial approval. At the Approval Hearing the Judge ensures the child or protected party's:

1. claim is not under-settled
2. compensation is appropriately managed and invested
3. The Litigation Friend's costs and expenses do not unduly erode the compensation

Settlement Approval Hearings

1. Generally conducted by a Master in the High Court or by a District Judge in the County Court.
2. Judge needs to see all relevant matters to assess whether proposed settlement is reasonable:
 - the medical evidence
 - the key evidence relating to liability if the proposed settlement is either to liability only or includes some discount for the risks on primary liability and/or contributory negligence
 - a supportive opinion
 - a birth certificate for all child claimants
 - a proposed consent order in accordance
 - An initial application for investment of damages
3. Can apply for anonymity

Get in touch



Clinical Negligence team

Kashmir Uppal



Clinical Negligence Lawyer of the year


National Eclipse Proclaim PI Awards
Nov 2018




Partner of the Year

Birmingham Law Society Legal Awards
March 2018

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#COURTOFPROTECTION

Agenda

Time	Topic	Speaker(s)
10:00 - 10:20	Welcome & Intro	Sue Bowler & Lucy Taylor, Shoosmiths
10:20 - 11:00	Litigation Masterclass	Denise Stephens, Shoosmiths
11:00 - 11:45	Case Management – Tips & Pitfalls for running an effective Multi-Disciplinary Team	Sue Bowler, Shoosmiths & Zoe Scott, Bush & Co.
11:45 - 12:30	LUNCH BREAK	
12:30 - 13:15	Adding Value & Settlement Considerations	Kashmir Uppal, Shoosmiths
13:15 - 13:30	The Role of the Deputy post Settlement - General Overview	Lucy Taylor, Shoosmiths
13:30 - 13:45	Family/Gratuitous Care Payments	Rebecca Bristow, Shoosmiths
13:45 - 14:00	Accommodation	Lauren Miner, Shoosmiths
14:00 - 14:15	Wills and Planning for the worst	Helen Gott, Shoosmiths
14:15 - 14:30	BREAK	
14:30 - 15:00	Financial Planning for the Future	Robin Bailey, Chase de Vere
15:00 - 15:30	Q&A with Panel & Close	All

The Role Of The Deputy Post Settlement



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Principal Associate

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07889 306 030



The Role of the Deputy post Settlement General Overview



Family / Gratuitous Care Payments



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Senior Associate

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Post settlement gratuitous care

- Family and Friends
- Providing assistance above and beyond the call of duty
- Rate claimed in litigation is usually commercial cost of care less 20 - 25% to reflect no income tax is payable
- Best Interests of P
 - How else is P contributing towards family costs
 - Overall family situation

Court of Protection's attitude to gratuitous care payments

- Family Care Payments
 - Natural love and affection
 - Informal care
 - Re HC [2015] EWCOP 29 – Senior Judge Lush applied 20% discount sim to PI claim
- Different for professional v lay deputy
 - Professionals to apply the best interests test
 - Lay to seek Court authority if reimbursing themselves or someone closely connected to
- Important to consider Court authority if working with lay deputies

Practical application post settlement

- Starting point is always the settlement
- Extends beyond parents and partners
- COP team's role to consider practical application
 - Recovery
 - Changes post settlement
 - Acceptance of commercial care
- What does P's family want?

Accommodation



Lauren Miner
Associate

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07762 889 897



A brief note on *Swift v Carpenter*

- On the whole, good news!
- Cash injection vs. excessive benefit to the estate

Pre-2017 Roberts calculation (2.5%DR):	$£900,000 \times 2.5\% \times 26.54 =$	£567,150
Roberts calculation (-0.75% DR):	$£900,000 \times -0.75\% \times 55.02 =$	-£371,385, so NIL.
Roberts calculation (-0.25% DR):	$£900,000 \times -0.25\% \times 48.34 =$	-£108,765, so NIL.
New approach calculation:	$£900,000 - £98,087 =$	£801,913

- Caution!
- Delays...

Outsourcing specialists

- PROS:
 - Experts in disability adaptations
 - Time
 - Breadth of experience
 - Generally reduces risk of future issue
- CONS:
 - Cost – can it be recovered or has it been recovered?

Working with a case manager

- Play to your strengths
- Know your limits!
- Case management is already a big job– do we want to compromise that?
- Oversight and attention to detail specific to P
- Time!

Using your OT

- Involve from the outset!
- Does P have an existing OT?
- Do they have accommodation expertise?
- If not, considering bringing in an accommodation OT early enough to understand P before the property project – if you have the means

Rentals

- Don't disregard them!
- Testing opportunity
- Space!
- Always worth at least having the conversation

Need vs Want

- The “wants” of either P or P’s family can be very difficult to negotiate
- Although P’s style and wishes should be valued and taken into account, it’s important to set expectations
- Hydrotherapy!
- Changes over time

When funds aren't sufficient

- Have all elements been awarded to 100%?
- Cutting corners?
- Compromise!
- Talk to your financial advisor
- Don't forget future-proofing – how old is P? Are they going to need changes in future? How often?

Wills and Planning for the worst



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Associate

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Does the client already have a Will?

- The starting point is to see whether the client already has a Will in place.
- If so, the existing Will should be reviewed to check:
 - Is the Will validly executed?
 - Does it reflect the client's current circumstances?
 - Does it benefit people who are no longer in the client's life or exclude people who are now in the client's life?
 - Does it appoint executors who would be able to deal with a large estate?
 - Is it likely that the client will regain capacity to update their Will?

Example – Barbara is 75, sustains a brain injury in an RTA and receives a compensation award. Barbara had a diagnosis of dementia prior to the accident. She has a Will in place made when she was 70 in which she left her estate to her husband, Leslie, who has since died. The Will doesn't provide any substitute beneficiaries and as such, the Will fails. Barbara's estate would pass under the intestacy rules, the rules which apply when an individual doesn't have a Will.

On intestacy, the estate will pass to Barbara's sister from whom she is estranged.

Statutory Wills

- The Court of Protection can authorise the execution of a Statutory Will on behalf of a person who lacks capacity to make a will for themselves. (s 18(1)(i) Mental Capacity Act 2005). The test for capacity is the section 2 MCA 2005 capacity test.
- A person lacks capacity if they are unable to make a decision for themselves because of an impairment of or a disturbance in the functioning of the mind or brain (s 2(1) MCA 2005).
- The Court can't order a Statutory Will for anyone under 18 years of age. In cases where there are concerns that the client won't live to 18, the Deputy can apply for a statutory settlement to be put in place. The considerations for settlements are similar to the considerations for a Statutory Will.

Statutory Wills

- What is the Court looking at when considering a Statutory Will?
 - What is in the client's best interests taking into account:
 - The client's past and present wishes and feelings, including any previous Wills
 - Beliefs and values which would influence the client's decision if they had capacity
 - Other factors a client might consider if they were able to do so
 - Take in to account and if apt, consult with:
 - Anyone named by the client to be consulted
 - Anyone caring for the client or interested in their welfare
 - Attorney of an LPA or the client's deputy

Statutory Wills

- What information does the Court want to see to help make a decision?
 - Proposed draft Will
 - Capacity assessment
 - Financial information including assets, income and expenditure
 - Copies of previous Will(s)
 - A family tree
 - Information regarding the client's current and future needs and their circumstances including care provisions
 - Details of the client's medical condition, life expectancy and any changes in the foreseeable future regarding increased expenditure
 - Information regarding the inheritance tax consequences of the estate and how this might change if the Will is approved
 - An explanation of how the proposed changes may alter the client's circumstances
 - Consent to act by the proposed executors

Other matters to consider

- Health and Care Lasting Power of Attorney for the client provided the client has capacity to put this document in place.
- Do the client's immediate family need to update their Wills in light of the client's injury?
 - If Barbara's husband was still alive, would he want to update his Will to leave his estate elsewhere or to Barbara in trust?
 - Parents updating their Wills to put their child's share in trust rather than gifting it outright
 - Have the client's family appointed the client to act as executor or guardian in their Wills – is that appointment still practical?
 - Do the client's family want to put in place Lasting Powers of Attorney for financial decisions and/or health care decisions?

Financial Planning for the Future



Robin Bailey

Specialist Independent Financial Advisor
Damages Awards Personal Injury / Clinical
Negligence / Court of Protection

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Financial Planning for the Future

Chase de Vere

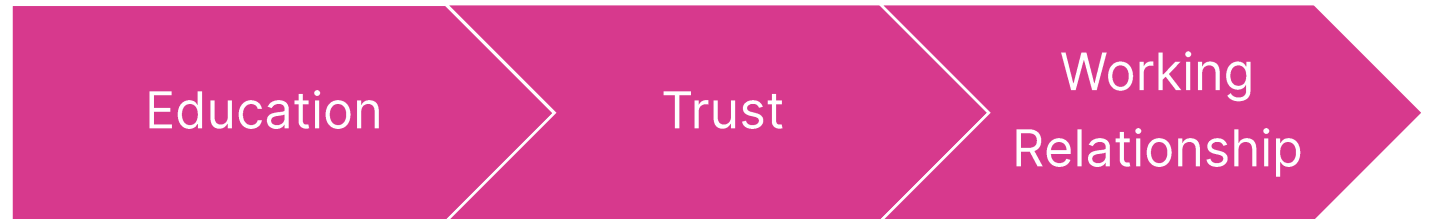
Chase de Vere Personal Injury and Court of Protection

Chase de Vere's Personal Injury and Court of Protection team is highly experienced in providing holistic financial advice to individuals, trustees and deputies in personal injury cases. We specialise in Personal Injury Trusts, Periodical Payments and the investment of damages awards. We provide dedicated services for damages awards led by recognised experts in this field.

Guidance & Support

Role of the Financial Planning Adviser in Damages Awards

Goes beyond the purely financial:



Financial
Planning
led Solutions

INVESTMENT MANAGEMENT

COURT OF PROTECTION

Financial Products

Tax Planning

State Support / Welfare Benefits

ESG

Capital
Needs

Income Needs

THE PLANNING JIGSAW

Periodical Payments

Risk

Review

Regulator

Ethical

**DEPUTYSHIP
STANDARDS**

CASH PLANNING

Pensions

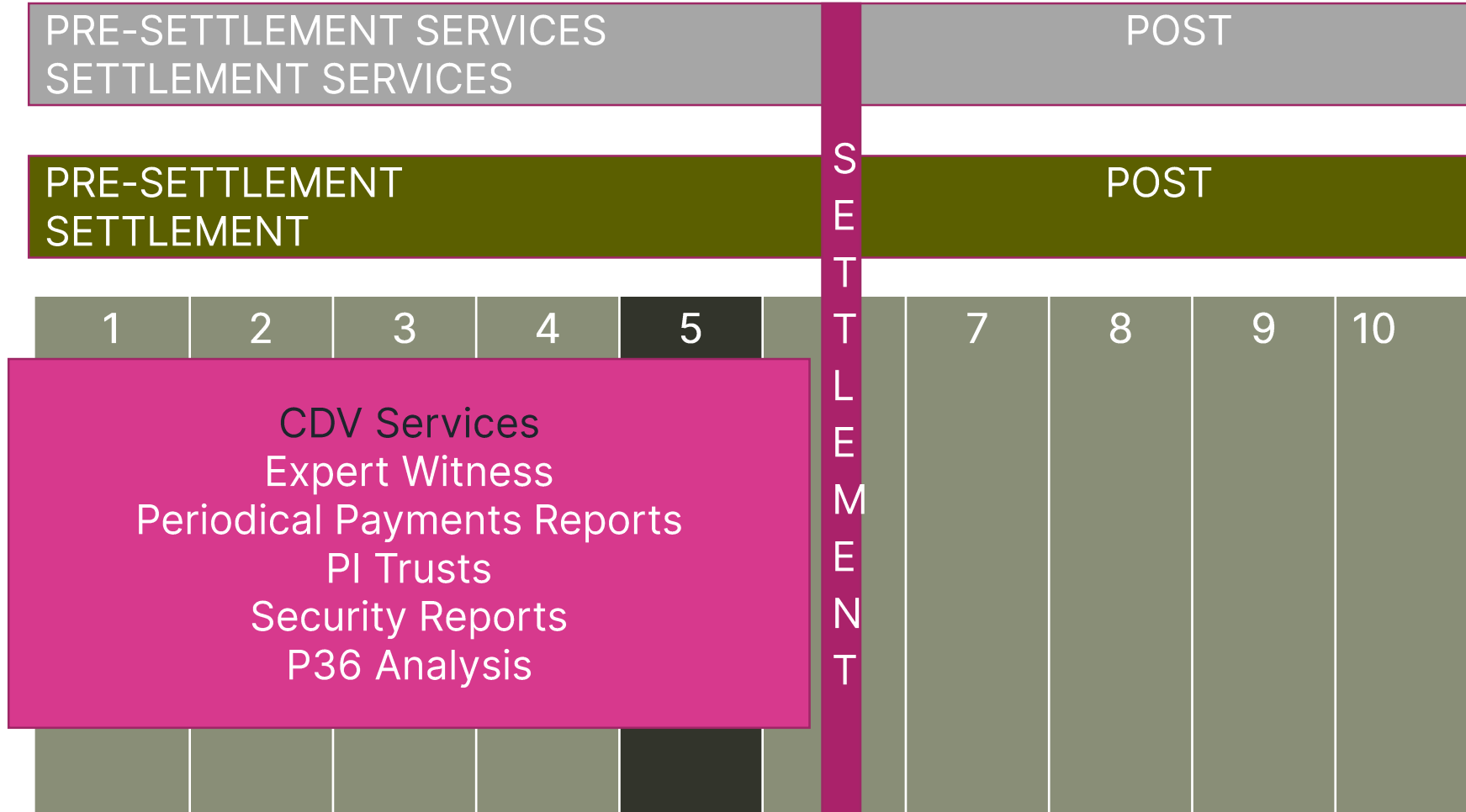
Sustainability

**Personal Injury
Trust**

FSCS

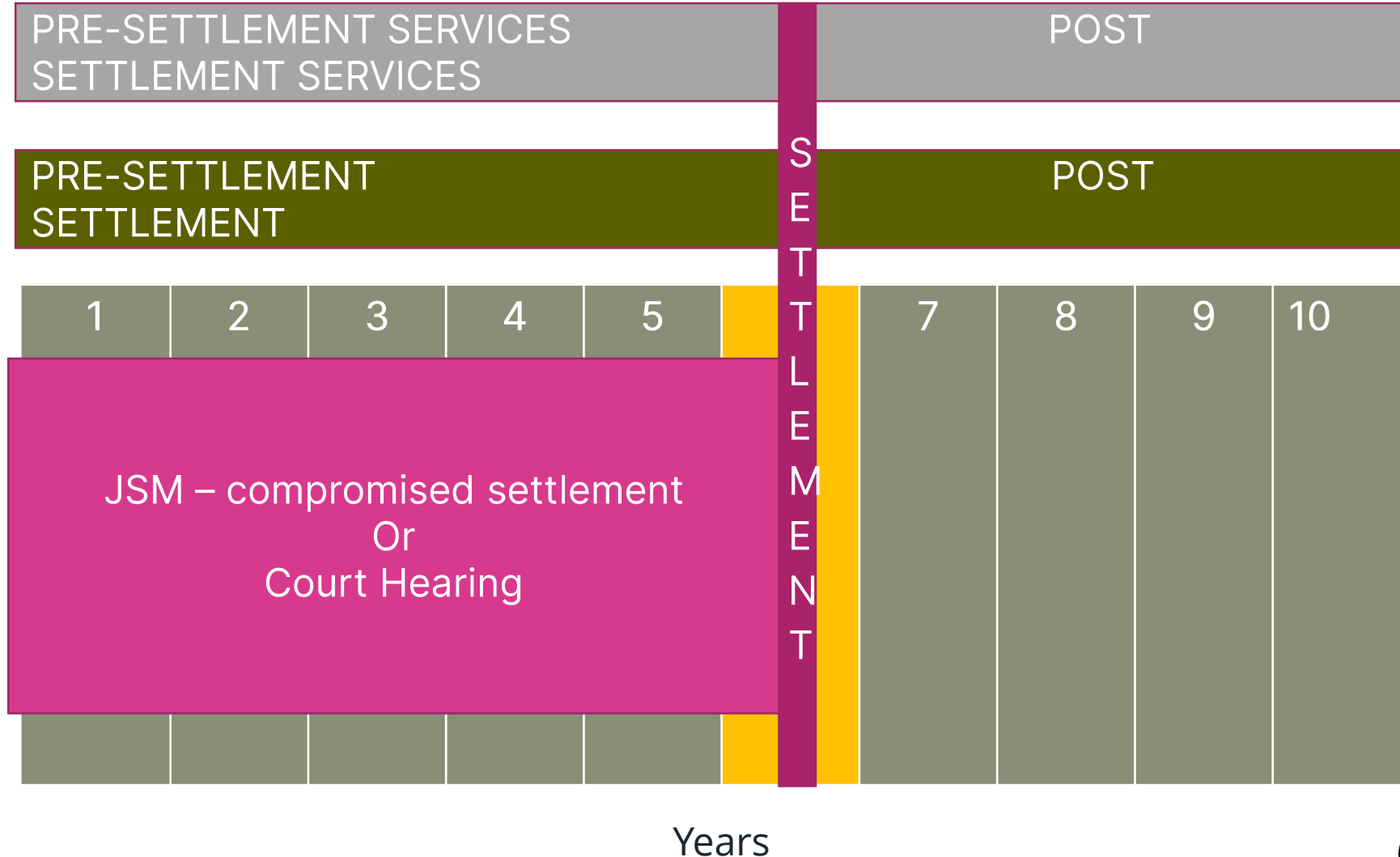
Chase de Vere

Advice Journey

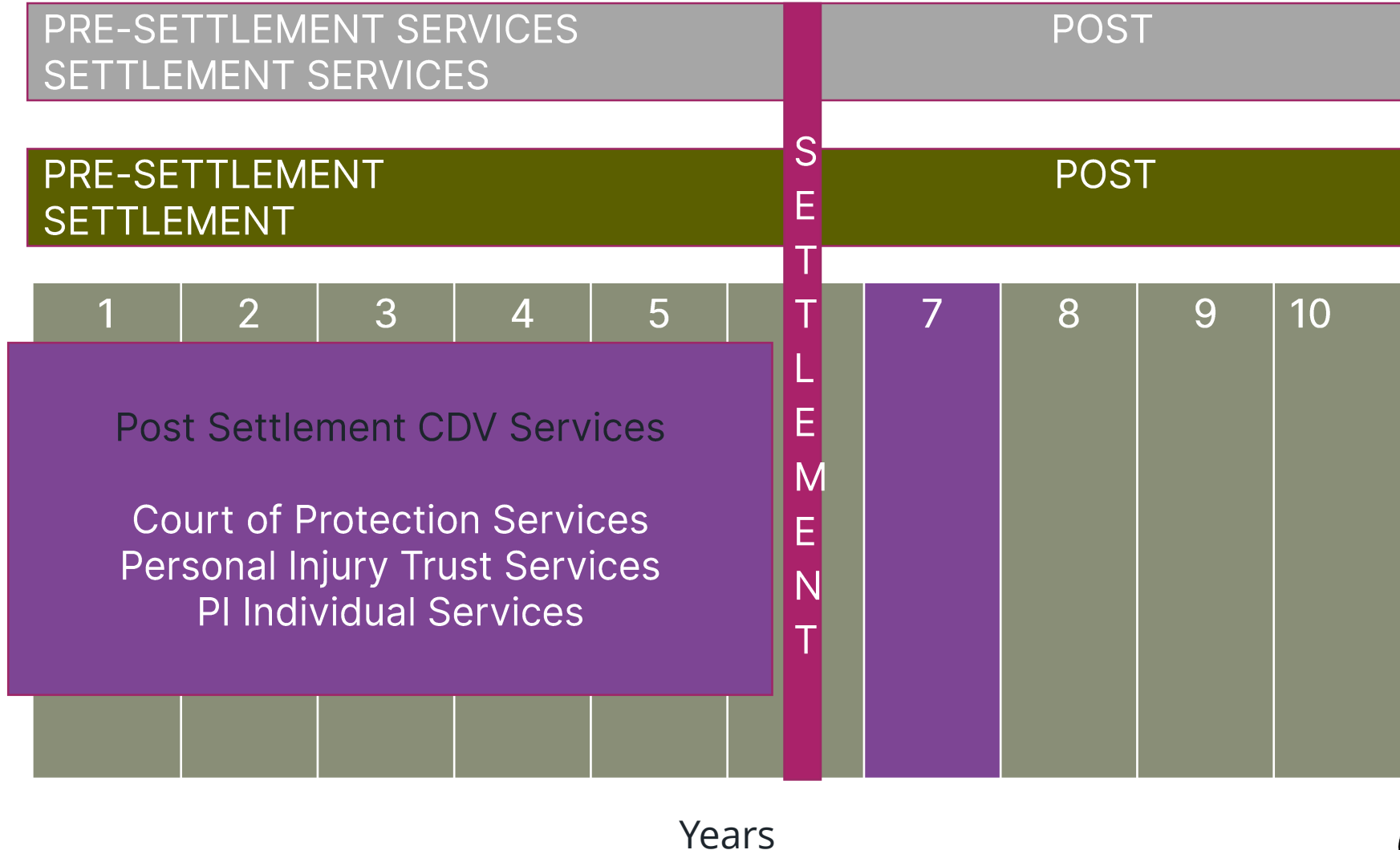


Years

Advice Journey



Advice Journey



Years

Settlement of Damages Awards

The logic underlying lump sum awards of damages for future loss is that the award should gradually be used over the claimant's lifetime so that by the time he dies it has reduced to zero.

Lump Sums

Top Down Approach

Losses such as the cost of future care and loss of earnings are quantified by use of the:

Multiplicand / Multiplier Approach
Discount Rate -0.25%

Life Expectancy Issues?

Objective:

A crucial principle in the assessment of damages in personal injury claims is that the Claimant should be put, as far as possible, back into the position they were in before the injury was sustained.

Discount Rate

Process introduced by Civil Liabilities Act 2018 established a new benchmark for the type of portfolio and risk used in setting the rate.

Discount Rate - 0.25%

Rate set with reductions for:

- Inflation
- Tax
- Expenses
- From assumed return of CPI + 2%

Plus a further reduction to reduce risk of under compensation

Traditional Lump Sum settlement

H West & Sons Ltd v Shephard, Lord Pearce said:

“The court has to perform the difficult and artificial task of converting into monetary damages the physical injury and deprivation and pain and to give judgement for what it considers to be a reasonable sum. It does not look beyond the judgement to the spending of the damages”

Lump Sum

Advantages

- Free Hand
- Flexibility
- Claimant Preference?

Disadvantages

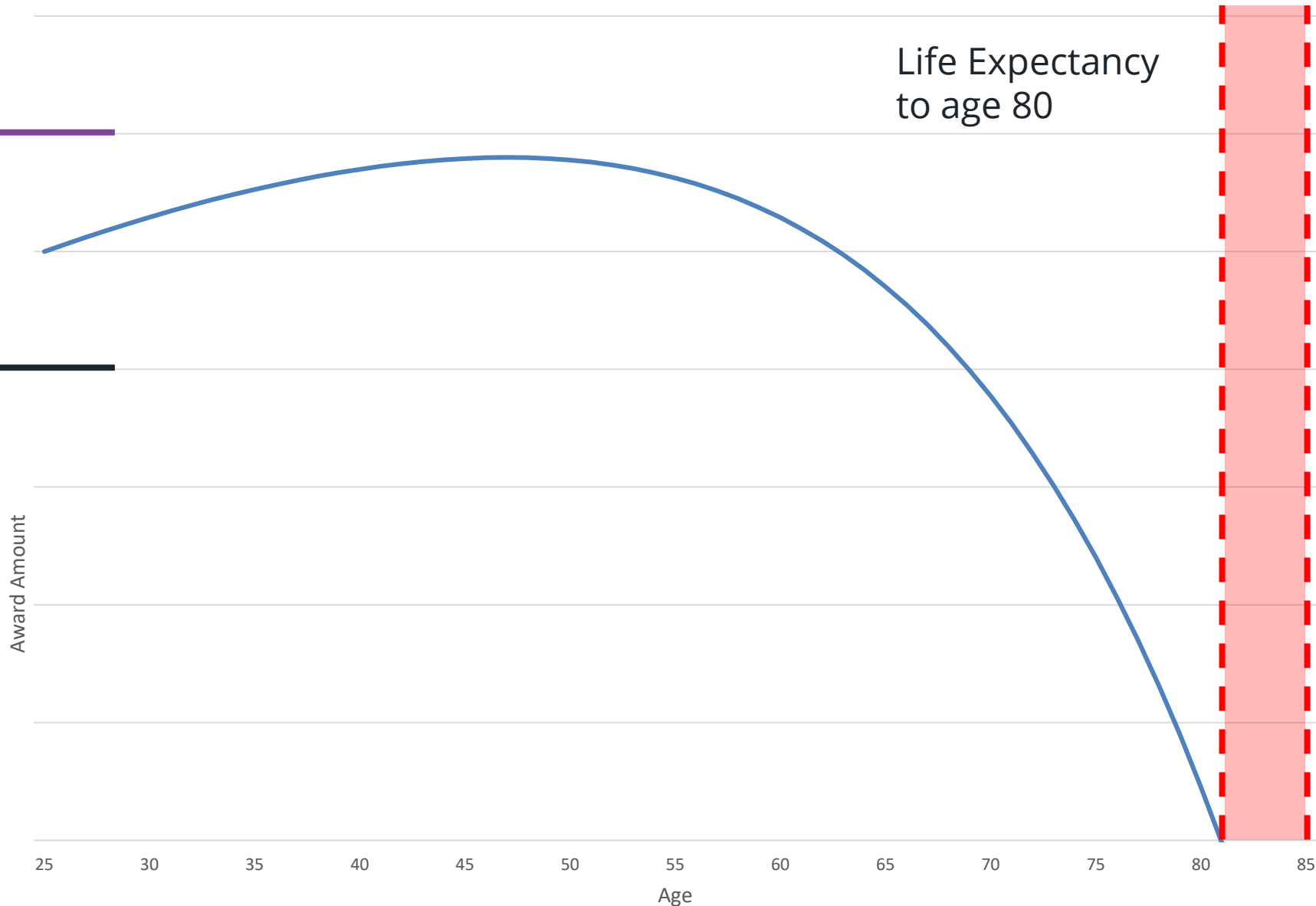
- Risk with Claimant
- Taxable
- Management
- Longevity?

Drawdown Analysis

£6 million
Claim by
Claimant 1

£5 million
Final
Settlement 3

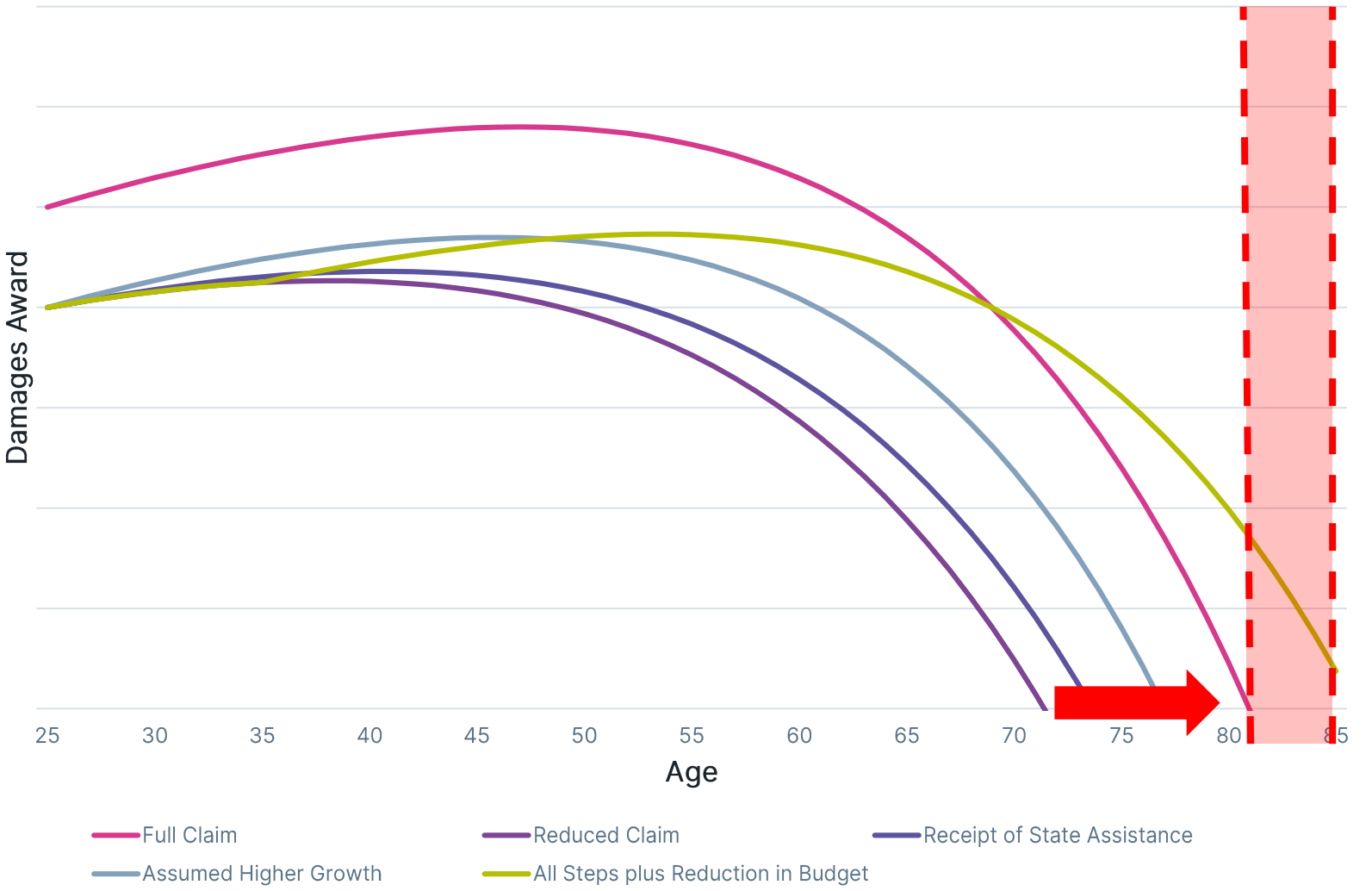
£4 million
Offer by
Defendant 2



Life Expectancy
to age 80

Client
surpassing
age 80

Drawdown Analysis



Settlement Including Periodical Payments

- Periodical Payments Bottom Up Approach
- Based upon the annual amount required;
- Removes arguments over life expectancy
- Reduces financial risk to the Claimant
- A Lump Sum only settlement provides a Top Down Approach

Periodical Payment Characteristics

Since the 1st April 2005 the Courts have had the power to make periodical payments for personal injury claims with future loss.

Following a slow start and the outcome of the Thompson et al cases on indexation now widely utilised mainly in claims exceeding £1m.



Periodical
Payments are
highly effective
but they're not a
Panacea

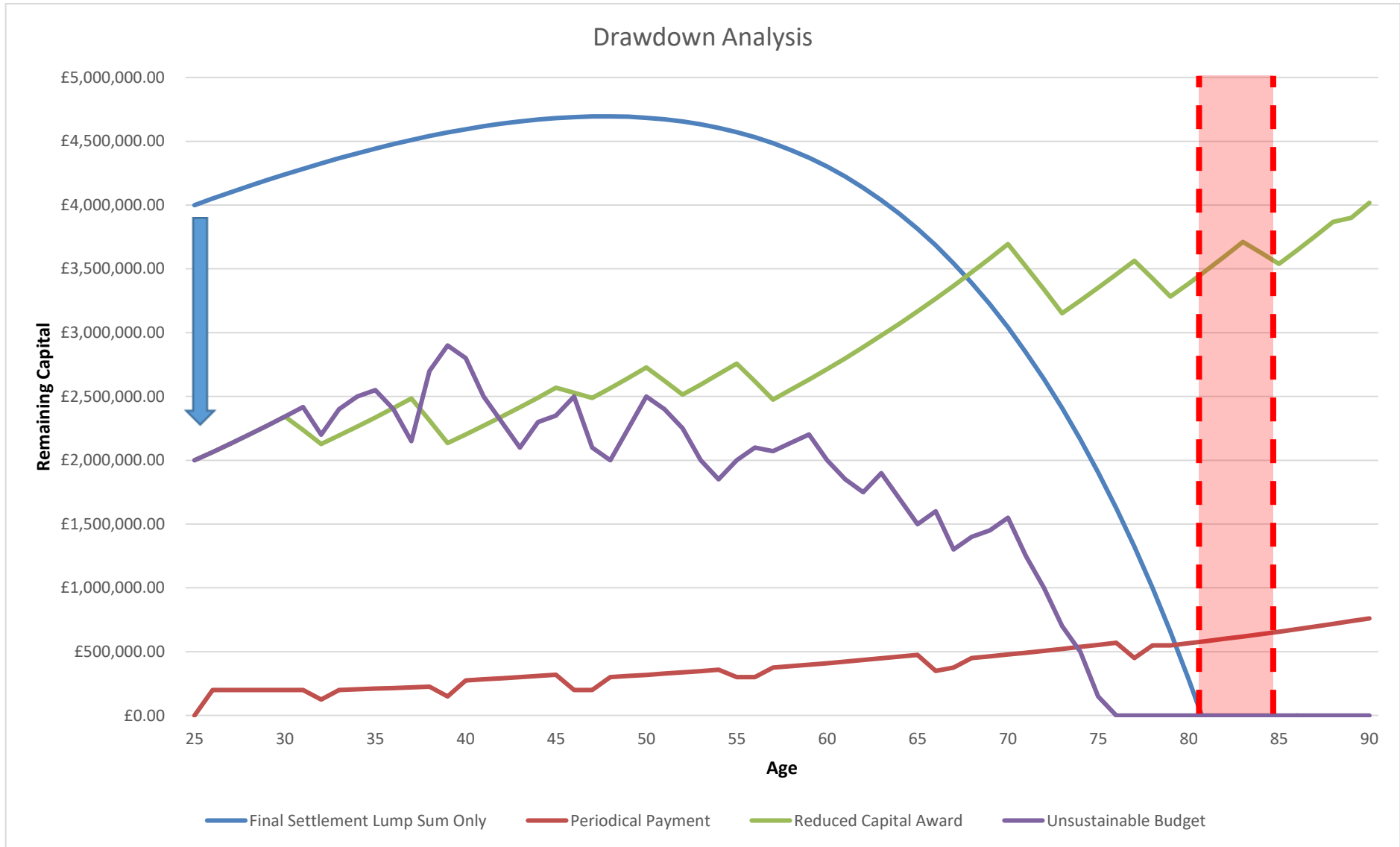
Periodical Payments

Advantages

- Risk taken by Defendant
- Based on Annual Needs
- Tax Free
- Guaranteed
- Life certain
- Indexation

Disadvantages

- Inflexible
- Capital Needs?
- Link to Defendant



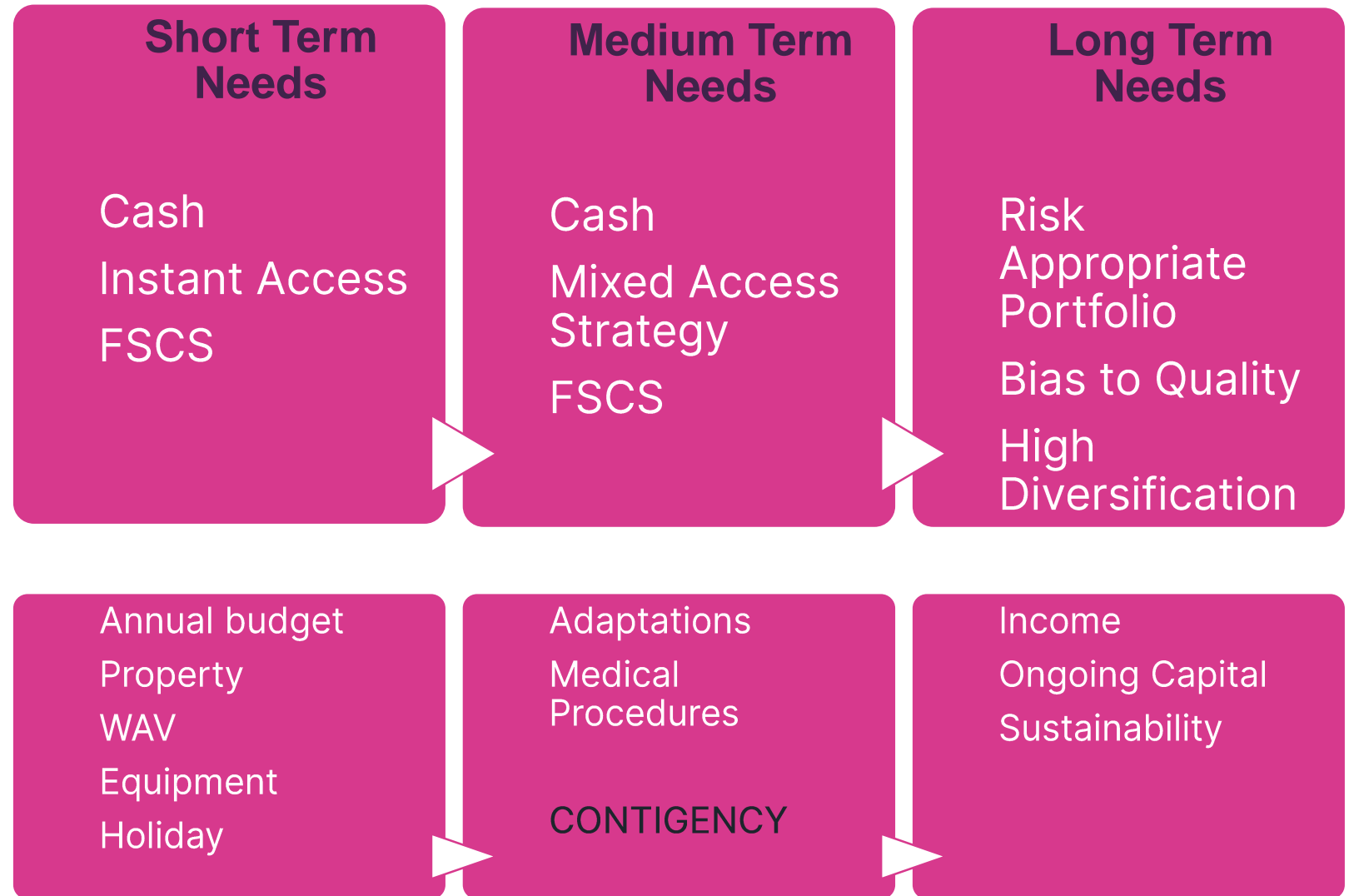
Financial Plan

Taking into account immediate and future needs.

Lloyd Lloyd of Berwick in Wells v Wells said:

“How the plaintiffs will in fact invest their damages is of course irrelevant. That is a question for them”

Apportionment of Funds:



Determining Investment Profile

Claimant's needs and objectives in relation to long term capital and income requirements.

Key Factors:

Timescale

Capacity for Loss

Risk

Inflation

Taxation

Investment
Mandate
Restrictions

Traditional
(no constraints)

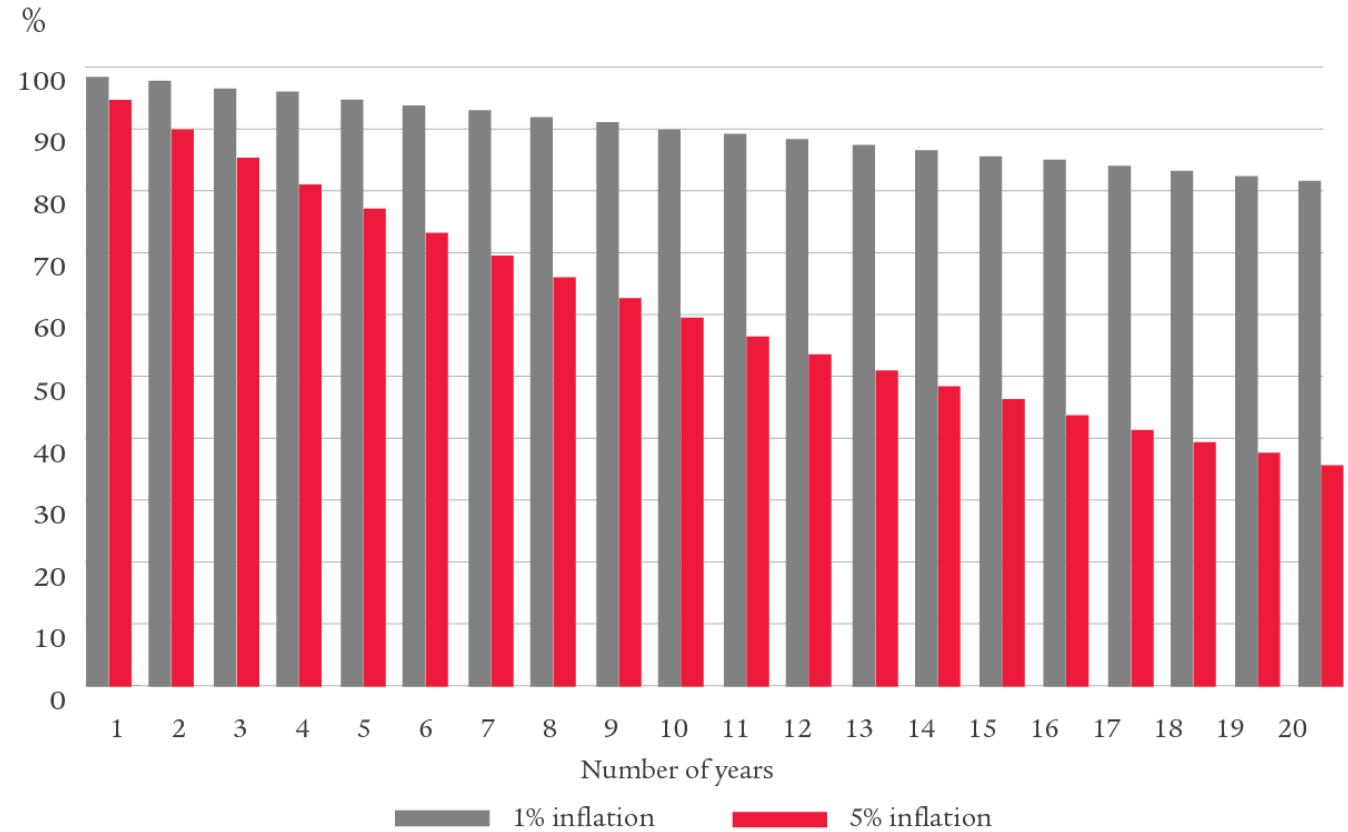
Religious
Constraints

E.S.G
Environmental
Social
Governance

Ethical

The Inflation Problem

Chart shows how at a 1% inflation rate £100 would be worth £82 after 20 years. At 5% inflation, it would be worth only £36.



Risk vs return trade-off

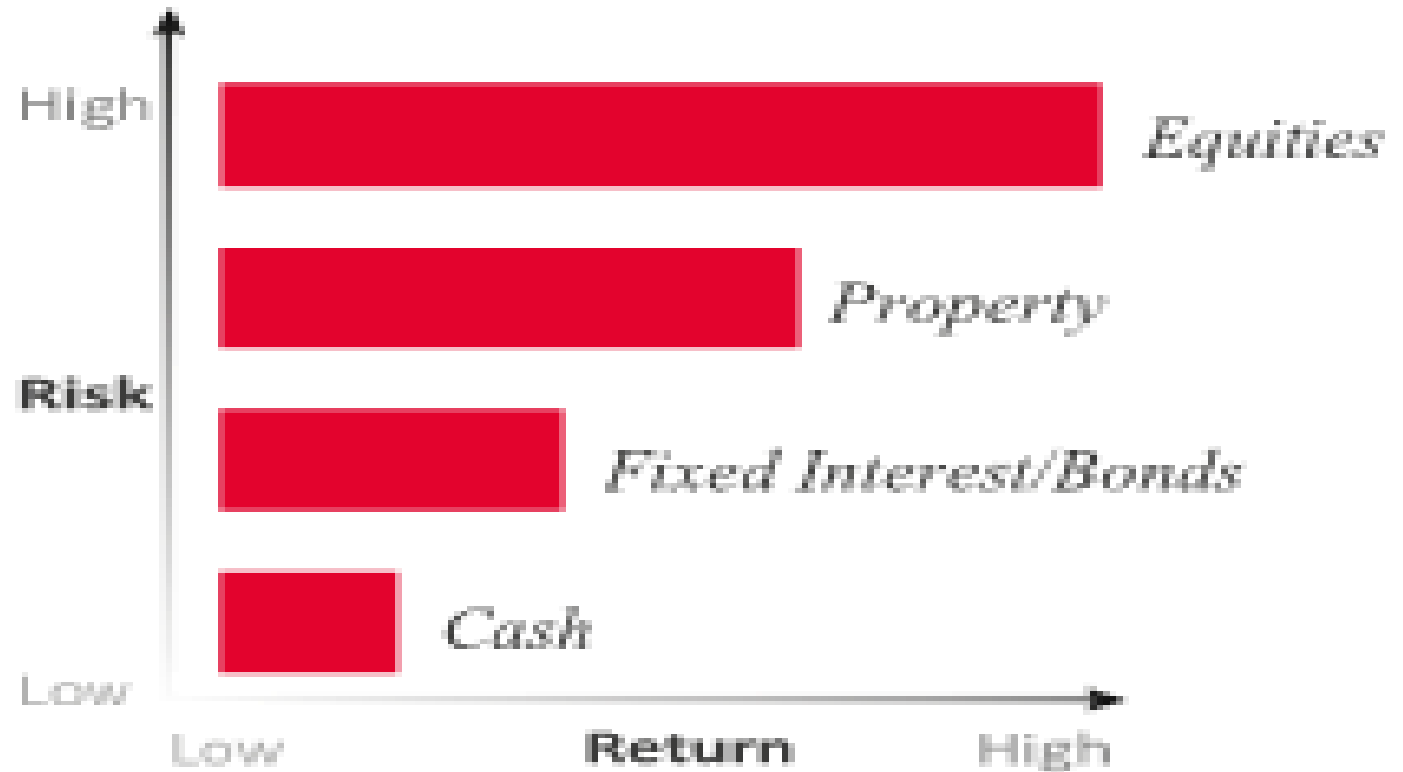
Potential return rises with an increase in risk. Different asset types (equities, bonds, property, cash etc) have different risk / reward characteristics. How much risk a saver should trade-off for a better return depends on several factors including their own aversion to risk, their ability to replace losses, and time available to achieve their goal.

Asset Classes

Asset Classes may include:

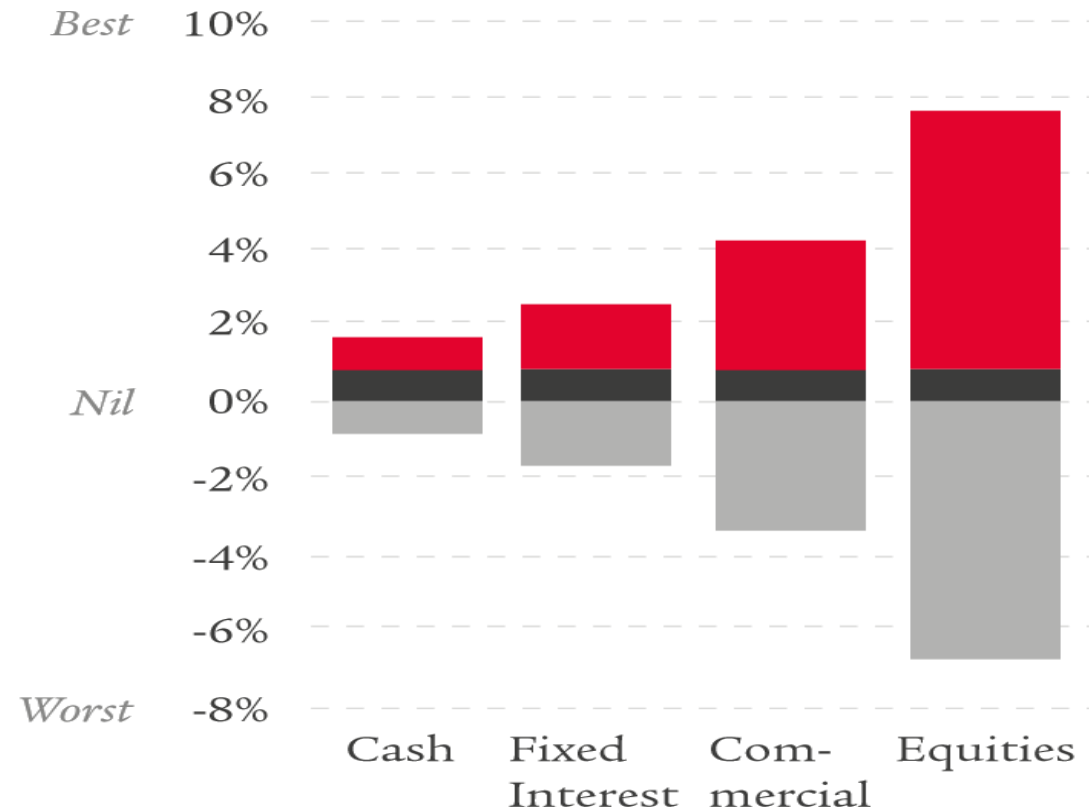
- Cash
- Fixed Interest
- Property
- Equities
- Alternatives

Risk vs Return (illustrative)



Lord Lloyd of Berwick in the Wells & Wells judgement stated "it does not follow that a prudent investment for the ordinary investor is a prudent investment for the plaintiffs. Equities may well prove the best long term investment but their volatility over the short term creates a serious risk" - July 1998.

Returns Variance (illustrative)



Diversify to control risk

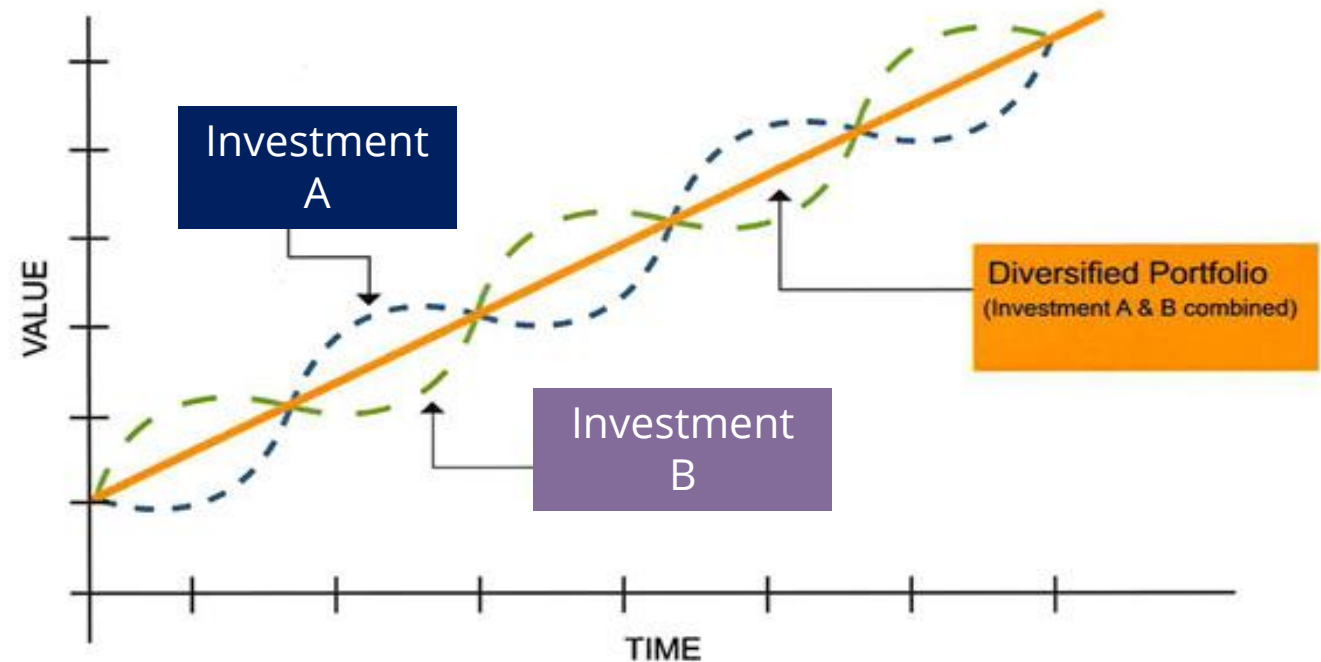
If market volatility is the bump in the road, diversification is the shock absorber. Because different assets respond differently to market forces, a good mix of assets in your portfolio can help smooth out investment returns, with the positive performance of some assets neutralising the negative performance of others. You should check your portfolio regularly to check that you've still got the right mix of assets for you.

The Benefit of Uncorrelated Investments

How Diversification Works

A Simplified Example

By owning a portfolio specifically designed to take advantage of asset categories with **dissimilar price movements**, an investor can minimize volatility while continuing to pursue positive returns.



Investment A and B have a negative correlation.

Chart shows since 2011 the annual performance of individual assets types compared to a portfolio made up of mixed assets.

Example portfolio: UK Equity 18%, America 15%, Europe 7%, Asia/Japan 5%, GEM Equity 2%, UK Fixed interest 26%, Global Bond 11%, UK Gilt 5%, Property 8%, Cash 3%.

	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	10 year
Index Gilts	21.25%	19.30%	30.87%	18.56%	9.27%	30.84%	24.43%	3.91%	24.41%	27.21%	244.36%
UK Gilts	15.80%	19.03%	26.21%	17.79%	8.35%	29.31%	23.82%	0.45%	22.24%	16.17%	136.76%
IG Bonds	4.36%	15.05%	26.13%	14.52%	4.86%	25.41%	17.29%	0.25%	20.33%	13.65%	118.38%
Property	2.94%	13.01%	13.80%	11.24%	4.43%	25.40%	13.99%	0.22%	17.36%	12.78%	114.86%
Global Bonds	2.22%	12.89%	10.37%	9.83%	4.18%	16.79%	10.55%	-0.64%	16.04%	10.28%	95.67%
Cash	0.14%	10.95%	7.51%	5.87%	3.37%	16.41%	10.53%	-1.37%	14.29%	9.01%	83.63%
America	-1.55%	10.50%	6.98%	5.22%	0.07%	13.16%	7.85%	-2.22%	10.91%	7.77%	71.90%
Example Portfolio	-2.19%	6.93%	0.64%	4.82%	-0.26%	11.06%	6.05%	-3.23%	9.49%	6.26%	68.86%
High Yield Bonds	-3.83%	6.90%	0.16%	3.19%	-0.27%	10.82%	5.07%	-4.70%	7.00%	6.24%	60.89%
UK Equity	-7.04%	1.85%	-0.11%	1.25%	-0.66%	10.09%	2.16%	-9.07%	5.88%	4.00%	54.32%
Europe	-15.57%	1.62%	-2.37%	0.64%	-0.93%	9.08%	2.03%	-11.19%	4.99%	0.43%	47.62%
Asia/Japan	-16.17%	0.57%	-3.84%	0.07%	-1.27%	0.29%	1.72%	-11.78%	0.73%	-3.59%	47.20%
GEM Equity	-19.02%	0.21%	-5.11%	-0.94%	-10.19%	0.23%	0.14%	-12.16%	0.21%	-6.01%	3.03%

Asset Allocation Example

For Illustrative Purposes Only

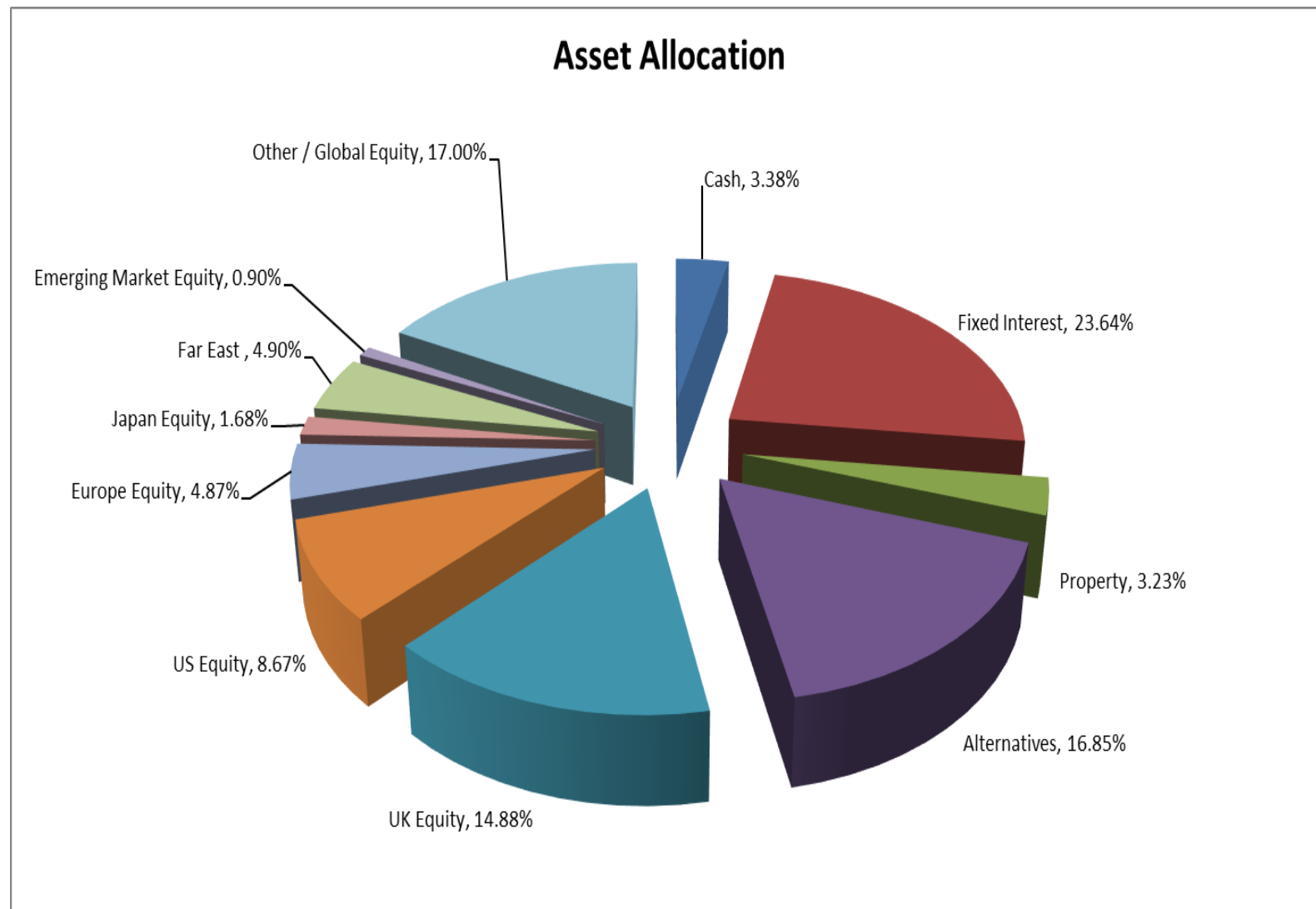


Chart shows:
CBOE UK 100 TR
UT MIXED INVESTMENT 20-
60%
Since March 2016

Source: FE Analytics



01/03/2016 - 01/03/2021 Data from FE fundinfo2021

Chart shows
MSCI WORLD TR
UT MIXED INVESTMENT 20-
60%

Source: FE Analytics



10/02/2016 - 10/02/2021 Data from FE fundinfo 2021

Planning Solutions for Claimants'

INVESTMENT MANAGEMENT

Financial Products **COURT OF PROTECTION**

State Support / Welfare Benefits **Risk**

Tax Planning **DEPUTYSHIP STANDARDS**

Periodical Payments **CASH PLANNING**

SUSTAINABILTY COSTS **ESG**

Review

Review

Review

Adviser Role:

To support Claimants, families and their legal teams through difficult times and ensure that vulnerable people, including children and adults are well placed to meet their lifetime financial needs. The role is to help improve financial outcomes in peoples lives.

Important information

Past performance is not a reliable indicator of future performance.

Investments can go up and down in value, so you could get back less than you put in.

Correct at the time of writing 2 March 2021 and is intended for general information only and should not be construed as advice.

#COURTOFPROTECTION

Thank you

Court of Protection

From Litigation to Deputyship

SH ∞ SMITHS

