HANDED DOWN JUDGEMENT

Draft judgement to be handed down on **Monday, 6th April 1998**

at **10.30 am** in Court **1, Liverpool Crown Court** ; confidential to Counsel and their instructing solicitors, but the substance of which may be communicated to clients not more than one hour before the giving of the judgment.

THIS IS AN UNREVISED JUDGEMENT. It is made available on the clear understanding that it is to be treated as such. The official version of the judgement will be available from the shorthand writers once it has been approved by the Judge.

IN THE HIGH COURT OF JUSTICE

LIVERPOOL CROWN COURT

QUEEN'S BENCH DIVISION

THE HONOURABLE MR JUSTICE GARLAND

IAN MARK COWIE (By his Mother and Next Friend, Kathleen Cowie)

v.

JOHN WHITHAM

Date of Hearing: 23rd-26th March 1998

Counsel for Plaintiff: Mr Giles WINGATE-SAUL QC
Mr Hugh DAVIES

Counsel for Defendant: Mr Jonathan FOSTER QC
Mr Nicholas FEWTRELL

GARLAND, J.: On 10th January 1985 the Plaintiff, then just over 3 years old, was run over outside his home in Dineley Avenue, Todmorden. He sustained a severe head injury and was unconscious for a fortnight. He suffered brain damage which has had both physical and cognitive consequences. Physically, he has a left hemiparesis. His left wrist and hand have no function, although there is some proximal function in the arm. His left leg gives him an uncomfortable lopsided gait. This is exacerbated by hemiatrophy; his right side has grown faster than the left. The vision in his left eye is severely reduced in field and acuity. He can only see very large letters and is virtually one-eyed The cognitive consequences, though properly described as "moderate brain damage", are very serious. His Full Scale IQ is in the range 47-50. He can talk in simple terms, can read and write at the level of a 6 to 7-year old, and is able, given the number in writing, to use a telephone. He is unemployable and incapable of managing his own affairs. His inability to plan or to follow more than one simple instruction at a time, together with his lack of perception of danger, require that someone is available during his waking hours to keep an eye on him and assist him with tasks he cannot perform for himself. He is a patient, and a Receiver has already been appointed.

Liability was admitted and I am concerned only with issues relating to damages. Some heads of damage have been agreed; others are disputed. The Plaintiff asks for provisional damages pursuant to Section 32A(1) of the Supreme Court Act 1981 because it is accepted that the Plaintiff has a 1.5% chance of developing epilepsy which is three times greater than the average for the population as a whole of 0.5%. As to the appropriate multiplier, it has been assumed that the appropriate interest rate is 4.5%, although the decision of the Court of Appeal in ***WELLS & WELLS*** is subject to appeal to the House of Lords. There is, however, an issue, granted that the Full Life multiplier for a Plaintiff aged 16 is 20.4, as to whether any deduction

should be made for "contingencies other than mortality". The Plaintiff has "rounded down" the multiplier to 20; the Defendant contends for a 10% reduction to 18. The differences between the parties amount, in money terms, to approximately £700,000. They appear from a revised Schedule of Damages in which the Defendant has added a little to the distinctly bald assertions in the original Counter-Schedule. I had the advantage of seeing a short video of the Plaintiff at Ravenscliffe Special School where he will remain until he is 19. I did not see or speak to the Plaintiff, taking the view that even an informal meeting at Court would take place in very contrived circumstances and that I would be better guided by the assessments made by skilled and experienced professionals, set in the context of the factual evidence of his mother and her partner, Stephen **RICE**, to whom, for convenience, I shall refer as "parents" although Mr **RICE** is not the Plaintiff's father.

The Family

Mrs **COWIE** is now 40. She married in January 1978 and had three children, Michelle (b. 9th June 1978), Deborah (b. 4th April 1979) and Ian. In 1983 there was a divorce and Stephen **RICE** moved in to Dineley Avenue. He and Mrs **COWIE** have four children; Clare (b. 17th October 1984), Charlene (b. 3rd November 1985), Rosemary (b. 3rd October 1986) and Stephen (b. 19th December 1991). Michelle has left home to live with a partner and their child; Deborah is pregnant and expected to leave home shortly. However, two adults, Ian and four children from 6 to 13 years of age are living in a 3-bedroom house. Mr **RICE** was a gardener for the Local Authority until he was made redundant and now works three nights a week as a taxi driver, earning approximately £60 per week. The family income is supplemented by Child Allowance and Income Support.

The Background

Ian was discharged from hospital on 1st March 1985 and went to a school for physically handicapped children in August of that year. He spent five years there before transferring to a special school for those with learning difficulties, but spent one half day per week at a primary school and then one day at Todmorden High School with an educational assistant. In September 1996 he moved to Ravenscliffe Special School. He was very unhappy at Todmorden High School where he was teased, isolated, and unable to cope. From September 1997 he has been at Ravenscliffe five days per week and will remain there until he is 19.

Two psychologists were called, **Dr Sonia GATZANIS** for the Plaintiff and **Mr Peter RANDALL** for the Defendant. They did not differ significantly in their assessments of the Plaintiff's degree of disability and the fact that he will require, in Mr **RICE**'s words, "now and for the rest of his life a high level of support, guidance and care". They differed as to the reasonableness of provision for speech therapy and occupational therapy.

Dr David SHEPHERD, a Consultant Neurologist gave evidence for the Plaintiff and **Mr Myles GIBSON,** a Consultant Neurological Surgeon for the Defendant. They were agreed as to the risk that the Plaintiff might suffer from epilepsy and that, if he did, his expectation of life would be reduced. They differed slightly on the success rate of controlling treatment, and fundamentally on the probability that the form of epilepsy, if it developed, would be focal. They also expressed views on the appropriateness of physiotherapy and occupational therapy. **Mr Peter COX,** a Consultant Orthopaedic Surgeon, described the Plaintiff's left hemiplegia and hemiatrophy: he also referred to his letter of 12th March 1998 dealing with the Plaintiff's current back pain. He strongly supported continuing physiotherapy and hydrotherapy pointing out that

the Plaintiff's physical difficulties will increase with age, and that the difference in the length of his legs will predispose him to low back trouble and degenerative changes. The Defendant called no orthopaedic evidence. The Plaintiff also called the following witnesses:-

(1) **Mrs Margaret SARGENT,** the well known expert on the provision of care for both the physically handicapped and those who have suffered traumatic brain injury.

(2) **Julia HO,** a Consultant Occupational Therapist, who gave evidence concerning disputed items of equipment, transport needs, chiropody and the enhancing of the Plaintiff's quality of life with a computer and satellite television.

(3) **Susan FILSON,** a Consultant Chartered Physiotherapist, who dealt with the advantages which she perceived in continuing physiotherapy, hydrotherapy and the stimulation that could be derived from "Riding for the Disabled".

(4) **Stephanie COURIER,** a Speech and Language Therapist, who expressed the view that the Plaintiff would benefit from continuing speech therapy up to the age of 25 and thereafter from monitoring for the development of bad habits of speech or language regression.

(5) **Deborah LEES,** an Information Technology expert, who works at a special school for children with severe learning difficulties and has particular experience of the advances that can be made using a computer with one to one instruction and encouragement.

The Defendant did not call experts in any of these fields.

I turn to the Schedule which has 11 sections. It follows that 10, Interest, and 11, the Costs of the Receiver and Court of Protection, must be calculated after my determination of the total award under the nine remaining heads, of which the following are agreed:-

2.	Future Loss	£140,000
3.	Past Care	£123,000
7.	Accommodation	£ 50,000
9.	Miscellaneous Costs	£ 4,667
		£317,667

Some other figures within disputed heads are agreed: I shall refer to these when dealing with those sections.

1. GENERAL DAMAGES

The Defendant's argument was that the Plaintiff is not severely disabled and does not have a great deal of insight of the extent of his disabilities; that he is generally easygoing and placid, capable of doing some things for himself such as shaving, bathing and dressing, although he cannot manage buttons or fasteners. He wears T-shirts and tracksuit bottoms. It was submitted that the appropriate bracket for moderately severe brain damage is £80K - £90K and that an appropriate award would be £95K. Mr Wingate-Saul QC for the Plaintiff submitted that the Plaintiff is aware of what he has not got, has suffered from unkind teasing and avoidance, and

cannot walk very far; his left arm is virtually useless and he is, for practical purposes, one-eyed. The global deficit, it is submitted, is very considerable. In my view, the combination of cognitive deficit and physical handicap warrant an award substantially higher than what would be appropriate for the cognitive deficit alone. In my judgement, a proper award of general damages, leaving aside the risk of epilepsy, would be **£115,000**.

Provisional Award/Epilepsy

The risk to the Plaintiff is 1.5%; to the population at large 0.5%. The Plaintiff is therefore 1% at added risk which will remain for life. If he develops epilepsy, the likelihood that it will be controlled by drugs is, on the evidence, between 60-75%. There is accordingly the added risk of uncontrolled epilepsy of between 0.25 and 0.4%. I have referred to the difference between **Dr SHEPHERD** and **Mr Myles GIBSON** as to whether or not, if the Plaintiff developed epilepsy, it would be focal or take some other form. Focal epilepsy may be more difficult to control. **Dr SHEPHERD** conceded that on balance of probability it could be controlled. I have not made any adjustment to the figures to reflect this difference which would warrant only the most minimal adjustment in any event. However, the impact of uncontrolled epilepsy on the Plaintiff would be less serious than on an otherwise mentally unimpaired person who, although possibly physically disabled, is nevertheless capable of normal employment, able to drive a car, use equipment which would be dangerous to an epileptic and enjoy leisure activities such as swimming, or sailing; these, too, may be dangerous to an epileptic. I have to consider "a chance that at some ..... indefinite time in the future [the Plaintiff] will ..... develop some serious disease or suffer some serious deterioration in his physical condition ....." In ***PATERSON v. MINISTRY OF DEFENCE [1987] CLY 1194*** a 2 to 3% chance of mesothelioma was held to justify an award of provisional damages. In ***O'KENNEDY v. HARRIS (9th July 1990),*** Sir

Gervase Sheldon had to consider a 1.5% risk of epilepsy immediately following the injury, declining to 0.015 after ten years, standing at 0.25% at the time of trial. It has to be assumed that these figures represented the risk over and above the "general population" risk. It was held that the risk constituted a sufficient "chance", the Judge observing that the shorter the period of risk, the more important it was to keep the Plaintiff's options open. In ***IVORY v. MARTENS (21st October 1988)*** French, J. pointed out that the Court has a discretion whether or not to apply Section 32A(1). He regarded a 1 to 2% risk of a further functional deterioration which could be substantially reduced by a relatively straightforward surgical procedure as not warranting an award of provisional damages: a modest addition to the General Damages was made to compensate the Plaintiff for the risk.

In my judgement, the three most relevant factors are:-

1. That the risk will continue unaltered for life.

2. That the risk of <u>uncontrolled</u> epilepsy is as low as 0.25 - 0.4%.

3. That the impact of uncontrolled epilepsy on the Plaintiff is, sadly, considerably less than it would be on a Plaintiff able to lead an independent life and to undertake activities which the Plaintiff cannot.

Having regard to these factors, I consider a provisional award inappropriate and propose to add £5,000 to the General Damages to reflect the small but real risk of further epilepsy.

The award of General Damages will be **£120,000.**

4. **FUTURE CARE**

This falls into two parts: from trial until the Plaintiff leaves school at 19, and thereafter for the remainder of his life. His expectation of life is unaffected by his disabilities save only that if he develops epilepsy, it will be reduced by five years. This very small risk can appropriately be reflected in the multiplier.

The parties were deeply divided on future care. It was common ground that the Plaintiff will require:-

1. a Case Manager. The multiplicand is agreed at £3,590. The Plaintiff has taken a multiplier of 20, the Defendant one of 19, adding a year to the overall multiplier of 18 "for initial start up and contingency".

2. Carers, at least 15 hours per day, 365 days a year. The Plaintiff's case was that he requires someone to sleep in, that is to provide a 24-hour service. The Defendant's case is that until age 35, his principal carers will be his parents and that specific provision for sleeping in is unnecessary.

3. An Enabler to take the Plaintiff out and to provide one to one stimulation in the home. The Plaintiff's case was that the Enabler could also provide backup for the speech therapist; the physiotherapist by helping the Plaintiff flex his left arm and hand; and the occupational therapist

by encouraging the Plaintiff to use a computer for word processing, and also a soundbeam and keyboard, rather than play computer games all the time.

The fundamental difference between the parties was whether the parents ought reasonably to be expected to fulfil the role of carers after the Plaintiff leaves school at the age of 19 until Mrs **COWIE** approaches the age of 60 and the Plaintiff is 35. The short-term is not a matter of contention. From the date of trial until the Plaintiff is 19, it is agreed that the family can, as they have already done, fulfil the role of carers with an Enabler for 25 hours per week during school term and 35 hours during the holidays, supervised by a Case Manager. A multiplier of 2.5 has been taken and a total figure of £40,345 is agreed for family care and the Enabler, not including the Case Manager who is considered separately for the entire period. From age 19, the Plaintiff's case is that he will require carers/enablers for 98 hours per week (14 hours per day), sleep-in care and further sums for food and other expenses together with an allowance for the advertising costs for the carers/enablers producing a multiplicand of £51,832 with a multiplier of 17.5 (20 - 2.5). The Case Manager has to be added at £3,590 per annum (which is agreed) but both parties having included this cost on a full life basis, the difference between them being whether a multiplier of 19 or 20 is appropriate. The calculation was based on 58 weeks for the carers/enablers and sleepers-in to allow for holidays and sickness.

The Defendant's case is that the Plaintiff is heavily dependent on his mother both physically and emotionally. She has expressed an expectation of being the principal carer for the Plaintiff until she is 60 or thereabouts. From then on, the Plaintiff will be looked after by carers/enablers until he is 55, and will then go into a residential home. The multipliers relied on

are 8.5 for parental care; 5 for carers/enablers, and 2 for residential care, that is, 18 - 2.5 = 15.5 = 8.5 + 5 + 2. The Defendant criticised the evidence of Mrs **SARGENT** on three grounds:-

1. That her 1993 report was based on the provision of a resident carer.

2. That her draft report of May 1997 was based on 70 hours per week of care (at Agency rates) albeit supplemented by 30 hours in a Day Centre (no longer available free of charge) + Sleep in Care.

3. That her October 1997 report included one to one computer support, and that at least the parents could provide the "sleep-in" element of care.

I turn to the appropriate multiplier on the basis that 2.5 is to be subtracted from those elements of future care in the period from date of trial to age 19. The Ogden Tables for a Plaintiff aged 16 with a normal expectation of life is, as already stated, 20.4, rounded down by the Plaintiff to 20, whereas the Defendant contends that there should be a further 10% reduction to 18. This argument is based on the reasoning of McCullough, J. in ***JAWARDAN v. EAST BERKSHIRE HEALTH AUTHORITY [1990] 2 MED LR 1*** and the consideration of discounts in ***WELLS v. WELLS [1997] 1 PIQR Q1 at Q49.*** Section C4 of the Ogden Tables sets out factors by which a multiplier is to be adjusted to allow for unemployment, economic fluctuations and regional variations in opportunities for Plaintiffs of different ages. These factors are for use in calculating loss of earnings, not for calculating whole life provision for the Plaintiff. This point was made by Buxton, J. (as he then was) in ***STEPHENS v. DONCASTER HEALTH AUTHORITY [1996] 7 MED LR 357*** . Where there is a substantial reduction in a Plaintiff's expectation of life, it is proper, on authority, to take account of the additional hazards to a

Plaintiff in his or her particular circumstances, but here the Plaintiff's expectation of life is undiminished at the statistical average and there is no evidence of additional hazards which might render his expectation less than average. I see no logic in further reducing the figure of 20. The appropriate multiplier from age 19 is therefore 17.5. Should this be reduced for the very small risk that the Plaintiff's expectation of life would be five years less if he develops epilepsy? I take the view that a one in a hundred chance is so small as to be *de minimis.*

As to the multiplicand, the Case Manager is agreed at £3,590. What is an appropriate provision for carers and enablers having regard to the parents' expressed willingness to provide the care element? Mrs **SARGENT** rejected her earlier scheme for a resident housekeeper with provision for weekends and holidays on the ground that such people are very hard to find. Her May 1997 draft was for 70 hours of care at agency rates supplemented by a Day Centre for 30 hours. Day Centres have to be paid for and the agency rates for the 70 hours were high, so Mrs **SARGENT** in her last report allowed for carers/enablers at £6 per hour directly engaged (hence the advertising costs). Mr Foster QC urged me to accept Mrs **COWIE**'s evidence as to her future role. She and Mr **RICE** deserve the highest praise and commendation for what they have done over the past 13 years, but is it reasonable to expect them to continue to provide basic care assisted by an Enabler for 35 hours? They have four other children, one grandchild and another soon to be born. Once Ian leaves school, legally an adult, he is, in my view, entitled to proper provision for his care and quality of life independently of his parents who have already done, and continue to do, so much. When the Plaintiff leaves school, time will hang heavily on him unless by the combined services of Carer and Enabler he can be occupied both in the home and outside it. The only adjustment I would make is to reduce sleep-in care for an initial period represented

by a multiplier of 5, but otherwise to adopt Mrs **SARGENT**'s schedule 5. The annual figure, less sleep-in care, will therefore be:-

Care and Assistance	£ 34,104.00
ERNIC	£ 3,410.00
Food, etc	£ 2,600.00
Advertising	£ 1,000.00
	£ 41,114.00 x 17.5 = **£719,495.00**
Sleep-in	£ 9,744.00
ERNIC	£ 682.00
	£ 10,426.00 x 12.5 = **£130,325.00**
	£849,820.00

5. **AIDS AND EQUIPMENT**

The only items in dispute in the equipment schedule were:-

1. The Tricycle. I consider a lifetime's provision excessive and would reduce the provision to a single purchase with an expected "life" of ten years.

2. The Bath and Dishwasher. I consider these, on the evidence, to be fully justified. The Section 5 figures then become **£9,349, £973 x 16** and **£424 x 20**, that is, **£33,397.** The tricycle I propose to deal with on a lump sum basis to allow for purchase and maintenance over its 10-year life at **£1,900**.

The total award for Equipment is therefore **£35,297**.

The remaining items are:-

5.2 Clothes and Shoes. The claim is £5 per week in effect for extra washing because the Plaintiff soils his underwear, spills food and tends to get dirty. However, as already noted, he wears simple clothes but wears out his left shoes because of his lopsided gait. I do not regard the claim as unreasonable at **£5,000**.

5.3 Chiropody - **£2,100**. I am more than satisfied on the evidence that this is a necessary provision to deal with the wear and tear on the Plaintiff's left foot.

5.4 Computers. The Defendant's case was that the Plaintiff would only use a computer for games. Deborah **LEES,** apart from giving evidence as to the achievements of the seriously handicapped with one to one assistance, suggested that the Plaintiff would benefit from a soundbeam and keyboard. I wholly accept that any carer/enabler should be trained to help the Plaintiff on a one to one basis with very simple word processing. I consider the soundbeam an amenity rather than reasonable provision for the Plaintiff's mental stimulation and the maintenance of his very limited literacy. I would award a capital sum of **£2,500** and annual costs of **£500 x 20,** a total of **£12,500,** giving a combined total under this Section of **£54,897.**

6. THERAPIES

(1) Speech. I accept that the Plaintiff needs to be monitored to avoid falling into bad habits or underusing his speech because carers and enablers can anticipate what he is trying to say. Equally, the carers and enablers will require training or advice in order to ensure that they

encourage him to use his speech to the best of his ability. Stephanie **COURIER** was challenged as to the usefulness of continued therapy to age 25. Mr **GIBSON** thought it of no advantage, as did Dr **SHEPHERD** who was "unconvinced". I accept Stephanie **COURIER**'s division of the therapy into up to age 25 with a multiplier of 7 and from age 25 with a multiplier of 13. For the latter period, I regard the annual cost of £750 for Assessment, Advice and Training as eminently reasonable. For the earlier period, I consider continuing therapy on the scale envisaged as excessive. Assessment and Training for carers is a proper provision. It may well be that therapy will make little or no difference. **£2,550** per annum may be largely thrown away. I consider that some provision should be made for advice or limited therapy. I would make an arbitrary allowance of £500. This claim will therefore be:-

Period A x 7 **£340 + £500 + £20 = £860 x 7 = £6,020**

(2) Physiotherapy. I accept Susan **FILSON**'s evidence that the Plaintiff will benefit from a comparatively modest amount of physiotherapy. Indeed, it is self-evident that someone so lopsided could be helped in this way. I allow **£5,477**.

(4) Occupational Therapy. I accept the evidence that someone in the Plaintiff's position can benefit and have the quality of his life improved by a modest provision for occupational therapy and I allow **£3,200**.

(5) Holidays. I consider that there is a degree of over-provision. I would adopt the Defendant's projection, giving a total of **£18,200**.

I come finally to (3) Hydrotherapy and Riding For the Disabled. I am not persuaded that I should allow these items. The Plaintiff will have physiotherapy and can go swimming. There was very little evidence that he would pursue riding, therapeutic though it may be.

The total under Section 6 is therefore **£32,897**.

(8) Transport. The Plaintiff's family have bought a Nissan Serena MPV so that eight persons can be accommodated. The expectation is that this vehicle will be used until the Plaintiff is 19 and then exchanged for a hatchback or estate which can accommodate a folding version of the tricycle, the Plaintiff, and a carer or enabler. Transport is essential because the Plaintiff cannot walk more than a short distance without becoming tired: it was obvious from the video that walking is a difficult and strenuous exercise. However, I regard a Mondeo Estate 1.8 litre as over-provision for two persons and the folded tricycle from time to time. A hatchback with folding rear seats would be more than adequate. The mileage would be modest: I have assumed 7,500 miles a year. I do not consider it necessary to buy new cars for low mileage use. In my judgement, a fair approach is to take AA Motoring Costs figures for standing and running costs for a petrol car of 1.1 to 1.4 litres bearing in mind that petrol has gone up in price and is likely to continue to do so. Running costs would therefore be 15p a mile rather than 13.4 giving a total of **£1,125**. The purchase of a good second-hand hatchback or estate I will assume at **£10,000**.

The figures therefore become:-

1. (a) Purchase of Serena **£14,372**

(b) Running (omitting depreciation) **£ 4,142** (1657 x 2.5)

£18,514

2. Purchase of new vehicle, excess of cost over proceeds of Serena **£2,000**; or **£1,720** after acceleration.

3. Running costs **£1,125** (as above)

4. Standing charges **£1,987** (AA Tables)

What is the appropriate multiplier for 3. and 4. above? The Plaintiff takes 17.5, the Defendant submits 15 because the Plaintiff would not use a car in his later years. In my view, a modest reduction in the multiplier should be made to allow for reduced use and the possibility of not using a vehicle at all in the later years. I take a multiplier of 16. From the sum of running costs and standing charges there must be deducted the allowance of £850 a year, the assumed probable expenditure had the Plaintiff not been injured. The figures are therefore:-

£1,125.00	
£1,987.00	
£3,112.00	
(£850.00)	
£2,262.00 x 16 =	**£36,192.00**

The combined total will be:-

To age 19, the Serena	**£18,514.00**
Part exchange for second-hand 1.1 to 1.4 litre	**£ 1,720.00**
Net running and standing costs x 16	**£36,192.00**
	£56,426.00

The total figures will therefore be:-

Section 1.	**£120,000**
" 2.	**£140,000**
" 3.	**£123,000**
" 4.	**£849,820**
" 5.	**£ 54,897**
" 6.	**£ 32,897**
" 7.	**£ 50,000**
" 8.	**£ 56,426**
" 9.	**£ 4,667**
Total:	**£1,431,707**

I have already commented that Section 10, Interest, and Section 11, the Costs of the Receiver and Court of Protection, will have to be worked out and added to the figure above.

END OF TEXT