Neutral Citation Number: [2006] EWHC 3111 (QB)

Case No: HQ03X03492

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 December 2006

Before:

SIR RODGER BELL

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Between:

Khazar Iqbal (by his mother and litigation friend Irene Iqbal)	**Claimant**
- and -	
Whipps Cross University Hospital NHS Trust	**Defendant**

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- -

Mr Simon Taylor QC and **Mr William Latimer-Sayer** (instructed by **Parlett Kent**) for the **Claimant**
Mr Martin Spencer QC (instructed by **Hempsons**) for the **Defendant**

Hearing dates: 9-16 October 2006

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Sir Rodger Bell:

Introduction.

1. This is a judgment on the amount of damages to be awarded to the claimant, Khazar, for brain damage resulting in dystonic tetraplegic cerebral palsy and cognitive disability suffered around the time of his birth in the defendant's hospital on 4 March 1997. The defendant admits liability for Khazar's injuries, and judgment for damages to be assessed was entered by consent on 13 November 2003.

2. A number of heads of damage have been agreed by the parties, subject to the court's approval which I have no hesitation in giving. There is an issue as to whether some of the damages to be awarded for future losses should be by periodical payments rather than by traditional lump sum or by a combination of the two. The amounts agreed are as follows:

Pain, suffering and loss of amenity, and interest	£210,000	
Past loss, and interest	£360,000	
Future loss of earnings	£260,000	or £18,880 p.a. (from the age of 18)
Aids and equipment	£150,000	or £40,000 and £5,000p.a.
IT equipment	£175,000	or £50,000 and £5,723 p.a.
Treatment and therapies	£65,000	or £2,976 p.a.
Travel and transport	£100,000	or £12,640 and £4,000 p.a.
Holiday costs	£40,000	or £2,872 and £1,700 p.a.
Therapeutic leisure activities	£2,344	
Court of Protection and receivership	£180,000	or £13,000 and £7,647 p.a.
Miscellaneous	£40,000	or £2,872 and £1,700 p.a.

The defendant provided an indemnity against the possible cost of appealing against any future, unacceptable Statement of Educational Needs. The indemnity is in agreed terms which are acceptable to the court.

3. Apart from the question of lump sum or periodical payments, there are many issues relating to the cost of future care over successive phases of Khazar's life as it is presently foreseen. The expert witnesses have recommended different care packages and suggested different rates for paid care, there is a dispute as to whether Khazar will ever attend school as a boarder, and there is an issue as to whether he will benefit from free local authority care. There are some issues relating to the cost of accommodation. There is a dispute whether Khazar is entitled to claim for the "lost years" of earnings as a result of his reduced life expectancy and, if so, its value.

4. The background to the issues in the form of Khazar's disabilities and his family setting is essentially common ground. The combination of physical disability and learning difficulty is devastating. His cerebral palsy means that his movements are characterised by involuntary fluctuations of muscle tone. He is floppy at rest but his tone becomes stiffened when voluntary movements are attempted. He suffers from abnormal, curved, "windswept" posture. He will never walk or stand unaided, and he has no independent mobility apart from some ability to roll from side to side. Dr Rosenbloom, paediatric neurologist, expressed the unchallenged view that Khazar's motor abilities have plateaued, perhaps for the last two years. Khazar is wholly dependent on 24-hour care for all activities of daily life. He is doubly incontinent, and he is fed through a gastrostomy tube, save for a little oral feeding for texture and taste. All this is permanent. There will be no major functional improvement. He has epilepsy and has suffered convulsions, although these will probably continue to be reasonably controlled and occasional. He has permanent learning difficulties, probably towards the lower end of moderate, but with considerable variation in skills. The exact extent of his cognitive disability is difficult to judge because of his physical difficulties and his limited functional speech, but Mr Albert Reid and Dr Richard Lansdown, psychologists, do not expect a significant improvement in intellectual, cognitive functioning. There may be plateauing now of his rate of learning. There is nothing wrong with Khazar's vision and hearing and he is able to say several single words but his speech is severely dysarthric. He tends to communicate by eye pointing and using signs, with a sign book at school. Those who know him well, most obviously his parents, but also his regular carers, understand best and most readily what he means. He has some ability to reach out and operate switches and controls. He is demanding of attention, but in Dr Rosenbloom's view his personality is one area where he will continue to mature.

5. Dr Rosenbloom and Dr Thomas, a fellow paediatric neurologist, have agreed on life expectancy to the age of forty-one, a further thirty-one years and five months at trial.

6. Khazar's mother, Mrs Iqbal, is thirty-five. She comes from the Philippines. Mr Iqbal is forty-one. He comes from Pakistan. A back injury has kept him from work and heavy lifting for some years. They both come from cultures where close family connections are important. For many years after Khazar's birth they lived with Khazar in a small flat in Hackney, and looked after him themselves. The stress and weariness caused by Khazar's disabilities, and an understandable anxiety about a possible repetition of the events surrounding his birth, stood in the way of another child.

7. In August 2004, a four bedroom bungalow in Epsom, Surrey, was bought with a substantial interim payment. It was already partly converted for a previous disabled owner but needed further adaptations specific to Khazar's needs. In December 2004, a regime of carers was instituted.

8. In April 2005, after a successful appeal against the Local Education Authority's decision about school placement, Khazar began to attend Ingfield Manor School, Billingshurst, West Sussex, which uses the principles of conductive education which his parents admire. They had moved to South London with day attendance at that school in mind. It is 45 to 50 minutes drive according to Mr Iqbal, although there were also mentions of travelling an hour each way.

9. In September 2006, Mrs Iqbal bore a healthy baby boy. She would like one more child. Although there are issues as to just how much continuing care Mr and Mrs Iqbal can reasonably be expected to give to Khazar, it is common ground that he will continue to live under the same roof as his parents and his brother and any further siblings indefinitely.

10. But for the defendant's negligence, Khazar's intellectual functioning, and his physical abilities, would probably have been more or less within the average range, although Mr Reid and Dr Lansdown differ about just how far he would have gone with further education.

11. I will refer to other matters, so far as Khazar's disabilities and his family's wishes are concerned, as I consider the issues which remain despite the obvious and laudable efforts of those who represent the parties to reach agreement wherever possible.

Future Care

12. The most numerous and most costly issues at trial related to the likely cost of future care. It is common ground that Khazar will require the availability of a caring adult throughout each twenty-four hour period of his life and that the nature of the necessary care regimes will change as he grows older and as he reaches educational land marks and then leaves full-time education as an adult at an age when his parents would no longer have been responsible for his care, but for his disabilities. So far as day care is concerned, it is convenient and sensible to consider the care patterns from the age of 9.5, the beginning of the current school year in September 2006, and thereafter in bites by age at the beginning of the appropriate school or college year, as if he is precisely 9.5 or 10.5 or 12.5 etc. In fact he was 9 years and 7 months old when the trial began, and he is a little older still at the time of this judgment, but this was the approach suggested by Mr Simon Taylor QC, leading counsel for the claimant; I assume that where past or future losses were agreed they were taken to or from the date of trial, and the suggestion of Mr Martin Spencer QC that Khazar be taken to be 9, while even more convenient in some respects, and designed to be helpful, would distort the true position too much, in my view.

13. Night care will be subject to less variation than day care. Although Dr Rosenbloom and Dr Thomas deferred on detailed care needs to Mrs Maggie Sargent and Mrs Gillian Conradie, the care experts called for the claimant and the defendant respectively, they had previously agreed that Khazar will need his existing, waking night care for another year but that thereafter his needs are likely to be met by sleep-in

night care. The parties remained loyal to this agreement so far as the first year is concerned, although some evidence indicated that sleep-in care might be sufficient now, and Mrs Conradie expressed the view, not shared by Mrs Sargent, that Mr and Mrs Iqbal will be able to provide any necessary, occasional assistance at night after the next three years.

14. Mr Taylor and Mr Latimer-Sayer, for Khazar, argued two matters of general principle so far as the assessment of damages for future care is concerned. They reminded the court that so far as is financially possible the claimant should be put back into the position as if the negligence had not occurred (the 100% principle): see, for example, Lord Steyn in *Wells v. Wells* [1999] AC 345 at 382-383. The test of whether a particular, claimed head of loss is recoverable and, if so, its extent, is reasonableness. This, of course, I accept. However, Mr Taylor elaborated on this principle by arguing that there may be a range of reasonable options to meet a claimant's care needs and that provided that the care package for which the claimant contends falls within this range it should be accepted by the court. To mount an acceptable attack on the claimant's case the defendant has to do a good deal more than show that the odd element is a little higher than might be paid in some circumstances. Mr Taylor referred to the judgment of Buxton J., as he then was, in *Stephens v. Doncaster Health Authority* [1996] Med LR 357 in support of his argument. I cannot accept Mr Taylor's elaboration of the general principle. It comes too close to saying that there is a rebuttable presumption that the care package put forward on behalf of a claimant should be accepted. It does not seem to me to be supported by *Stephens*, where Buxton J. did no more than find that the care programme put forward on behalf of the plaintiff was reasonable, for the carefully analysed reasons which he gave. In *Wells* at page 390 A-B, Lord Hope reminded us that:

> " . the aim is to award such a sum of money that will amount to no more, and at the same time no less, than the net loss."

In a case like the present where the issues on future care are numerous, it should not matter whether one starts with the claimant's care plan, although that may be a convenient approach, or simply looks at the plans of the defendant and claimant together, before deciding in detail what is reasonably necessary for the proper care of the claimant. My preference for the view of one expert rather than the other, or a solution somewhere between the two on any particular issue, boils down to a personal judgment on the strength of the experts' reasoning and my own view of the reality of Khazar's likely situation in the light of the whole body of evidence. There was a little pre-trial fencing about the relative qualifications and experience of Mrs Sargent and Mrs Conradie, but they are both very experienced in advising upon and setting up and case-managing care packages within and outwith the context of litigation, and I see no reason to prefer one to the other on the grounds of past performance.

15. Mr Taylor's second general point attacked Mrs Conradie's approach to the involvement of Mr and Mrs Iqbal in her proposed care arrangements, which she based on being told by them that they wanted to remain involved in Khazar's care. So she reduced the amount of outside paid care by the number of hours which she estimated they would have spent on normal parental care of Khazar, and in so far as she judged them likely to provide more than normal parental care, in terms of time, she allowed for an amount of "paid" care by the parents in some parts of her care schemes.

16. Mr Taylor argued that it was not legitimate to incorporate Mr and Mrs Iqbal as part of Khazar's care package. Mrs Conradie's "by the clock" approach was wrong in law and fundamentally flawed, and had been rejected by the Court of Appeal in *Evans v. Pontypridd Roofing Limited* [2001] EWCA Civ 1657, [2001] P.I.Q.R. Q5. In *Evans*, the necessary full-time care for the disabled claimant, was entirely provided by his wife. May L.J. said, at paragraph 30 and 31:

> "Any determination of the services for which the court has to assess proper recompense will obviously depend on the circumstances of each case…… In my view, the evidence……justified the judge's view (that the claimant required 24 hour care) and justifies the conclusion that the services which Mrs Evans provides are those of a full time carer. The fact that for some of the time she does things which she would have done if her husband had not been injured does not detract from this conclusion."

17. *Evans* presented a very different situation to this case where it is common ground that paid carers will provide the bulk of Khazar's care, but his parents will provide care as well, but Mr Taylor again referred me to *Stephens* where, at pages 365 and 366, Buxton J. rejected the defendant's contention that the considerable time which Squadron Leader and Mrs Stephens would spend with their children justified any reduction in the amount of extra care required in the case of the claimant, on the basis that the care and attention which the claimant required was care and attention which was required to enable him to live some semblance of a normal life and to enable him to perform functions performed unaided by any normal boy of his age. That was different to what, in this case, we have called normal parental care.

> "The care regime is designed to put the claimant in a position where he can benefit from that normal attention from his parents: so that the parents' attention to him should not itself be viewed as part of that care regime."

18. I see the logic of that, but practical difficulties arise in the application of what Buxton J. said to the facts of this case. First, much of what Mr and Mrs Iqbal will do, in accordance with their expressed intention to continue to play a part in Khazar's care, both willingly and inevitably as a result of living in the same house and as part of a single family unit, will be what Mrs Conradie called "adapted parental care". The bonding which is essential between parent and child and which arises from loving attention in one form to a child who is not disabled, for instance playing physical games, will in some instances simply take another form, for instance helping Khazar to exercise or giving him one of his non-gastrostomy feeds when a paid carer does not do so. In other instances the "uninjured parental care" and "injured parental care", as Mr Martin Spencer QC for the defendant put it, will be much the same, for instance helping him with his computer, although the help may take a different form. Mrs Sargent and Mrs Conradie agreed that there will be times when no paid care, or no second paid carer, will be needed because Mr and Mrs Iqbal will willingly look after Khazar, and both experts made some, albeit different, allowance for that. To that extent Mr and Mrs Iqbal were legitimately incorporated as part of the care package of each expert, in my view.

19. Mr Spencer argued that the "time honoured" way of assessing care in cases such as this was by reference to the clock; first assessing the number of hours care which the young claimant requires, then considering the number of hours care which he would have received from his parents if he had not been injured. The difference is what is claimed. As I said during the trial, this is how the matter has been dealt with in a large number of cases of children who have suffered cerebral palsy as a result of peri-natal negligence, in which I have been involved as counsel or judge over the last thirty years, the jurisprudential basis being, I always thought, that what he has lost while still a child, or the need which is caused by the defendant's fault and which has to be compensated, is the difference between the care which is now needed and the care which would have been needed, but for that fault. This can most easily be valued in terms of time's worth.

20. However, bad practice should not be honoured by time, and on reflection it seems to me that it is consistent with both *Evans* and *Stephens* and, regardless of authority, only fair and sensible, that the need for paid care for Khazar must not be reduced simply by the number of hours of normal, voluntary parental care which would have been given to Khazar were he not disabled, regardless of whether Mr or Mrs Iqbal will in fact voluntarily look after Khazar for particular periods. The fact is that Khazar has been seriously disabled as the result of the defendant's negligence to the extent that he will always need 24-hour care from one or more carers. It follows that he is entitled to recover the cost of that care and the cost of it will only be reduced to the extent that his parents will willingly take it upon themselves thereby becoming part of his care package. It is obvious that care for a child with Khazar's problems is in large part more wearing than care for a child with no disabilities, and it must not be assumed that even the most devoted parents will be willing or able to render the same amount of care, in terms of time, to a disabled child as to one who has not been injured, once they are provided with the funds to employ the necessary care beyond their own voluntary help. Even then the need for outside, paid care can only be reduced to the extent that the number of parental hours falls within the number of hours of normal parental care which they would have given but for the injury. If and to the extent that Mr and Mrs Iqbal want to look after Khazar for periods in excess of what would have been periods of normal parental care, they can be incorporated as paid carers at a lesser rate than employed carers, but they cannot be constrained to do so, and there was no evidence that they do want to contribute to Khazar's care beyond the bounds, in terms of time, of normal parental care. That is not what they meant by expressing a wish to continue to be involved in Khazar's care, in my view. They were simply expressing a wish to help care for Khazar to some real extent; there was nothing in the evidence which indicated an intention to spend more time caring for him than they would have done but for his disabilities. Such an intention is inconsistent with their patent relief at being able afford paid help to allow them to return to something like a normal life and to have another child.

21. Then, however, the second practical difficulty arises. Mrs Sargent herself incorporated Mr and Mrs Iqbal in Khazar's care by making allowances for the anticipated contribution of the parents out of the cost of 24-hour paid care, or the cost of a second paid carer, so long as that contribution was within the bounds of normal parental care, in terms of time, and Mr Taylor did not of course fault Mrs Sargent in this respect. Moreover, at times Mrs Sargent appeared to take the course which I have concluded is an illegitimate course of reducing the hours of paid care simply by the

hours which she judged Mr and Mrs Iqbal would have spent on Khazar had he not been injured. This has on occasion led to difficulty in deciding just what allowance should be made for gratuitous parental care against paid care.

22. It is common ground that for the year from the age 9.5 to 10.5 it will be reasonable and sufficient to have one directly employed carer on duty at any time when a paid carer is required at all, and that night care is to be provided by a waking night carer, paid at an hourly rate and on duty from 10pm to 8am.

23. The first issue was for what periods a daytime paid carer is required. Mrs Sargent contended that from Monday to Friday, for school term weeks, a paid carer will be required for 4.5 hours a day. Khazar needs day care at home from 6.30am when he wakes until 8am when he leaves for school, and from 5.30pm when he gets home from school until the night carer arrives at 10pm, although he is normally settled in bed by 9pm. That means a total of 6 hours day care, which Mrs Sargent reduced to 4.5 hours. However, her reasons for making that reduction were not clear or consistent. Mrs Sargent had first allowed 5 hours paid care but on the understanding, she said, that Khazar returned from school at 4.30 to 5.30pm, and needed care from, say, 5pm. But in the course of the trial she learned that he returned at 5.30pm so she reduced the 5 hours to 4.5. But her pre-trial report revealed that she was aware that Khazar returned home at 5.30pm, and that she had costed in 5 hours of paid care, knowing that. When this was pointed out, Mrs Sargent said that the reason for the change from 5 to 4.5 hours was not her getting the time of return wrong; she was counting the parents normal care (by which I took her to mean "normal parental care") as well. Then again she said that you could charge for a paid carer from 5.30 to 9pm (as well as from 6.30 to 8am) and allow 9 to 10pm as parent's normal time. But this would have left 5 hours paid care, not 4.5, and it must be that in coming to a net total of 4.5 hours paid care Mrs Sargent was taking Mr Spencer's "time-honoured" approach of taking the total hours of required care and deducting what the parents would have given Khazar, had he not been injured, probably by allowing some normal parental care between 7 and 8.30am, in my view.

24. Mrs Conradie contended that a paid carer was required for just 3 hours a day, from 6.30 to 8am and from 5.30 to 7pm when Khazar finished his daily, evening bath. Then the parents should be treated as giving Khazar normal parental care until he was settled in bed at 9pm. The next hour, until the night carer arrived should be paid as beyond normal parental care, albeit at a lower rate than an employed carer.

25. Mrs Sargent and Mrs Conradie updated their original reports as the trial approached, Mrs Sargent in January 2006 and Mrs Conradie in March 2006. They both reported that Mr and Mrs Iqbal were looking after Khazar from 6.30 to 8am, although at trial it appeared that the hourly paid night carer was available to help during those hours. A paid carer was in the house, Monday to Friday, from 5.30 to 10pm when the waking night carer arrived, so Mr and Mrs Iqbal were looking after Khazaar from his early return at 3.30pm on Friday until 5.30pm. The rotas for paid carers, made out by Mrs Iqbal, show this pattern continuing, with minor variations, until the end of the Summer term, and starting up again at the beginning of the Autumn term although Mrs Iqbal's internment was imminent.

26. In my judgment, the pattern which has prevailed, involving 4.5 hours paid care in addition to the night carer, from Monday to Friday in term time is reasonable, and it

follows that the amended claim for 4.5 hours paid care is reasonable. It might be said that no paid carer is needed between bedtime at 9pm and the arrival of the waking night carer at 10pm, or between arrival home from school and bath-time, but I am not prepared to fault the pattern of care which Mr and Mrs Iqbal have adopted.

27. For term-time weekends, Mrs Sargent allowed for 10 hours paid care a day, which she reached by taking the 14 hours between Khazar waking at 8am and the night carer arriving at 10pm, and deducting 4 hours per day for normal parental care. Mrs Conradie allowed only 6 hours a day for employed, paid care, but she again allowed an hour a day paid care by the parents, so she was allowing for 5 hours a day normal parental care. In fact, according to Mrs Sargent's January 2006 update paid care was being provided at weekends for 8 hours a day from 9am to 5pm, although it appears from the text of her report that her information may have come from case managers, and a waking night carer came in on Friday and Saturday nights from 10pm to 6am, but not on Sunday night. The rotas from February 2006 onwards often show longer hours than 9am to 5pm at weekends, for instance 10 am to 10pm or 10am to 8pm, and night care on Saturday and Sunday nights is very variable. This was not explored in evidence; there is a limit to how much detail can sensibly be explored. The rotas show day care divided between two carers with a second carer sometimes present at the same time on limited occasions. It does appear that Mr and Mrs Iqbal came to think that they needed more than 8 hours a day paid care on Saturdays and Sundays, and the 10 hours which is claimed is a reasonable allowance in my judgment. It is a figure between what Mrs Sargent understood the position to be, and was in some weeks, and the longer hours of paid care which have been used from time to time. I do not think it reasonable for Mr and Mrs Iqbal to receive only 6 hours a day employed, paid care at weekends, to help look after Khazar with all the demands which he must present, now that they have the second child they were perfectly entitled to have, and they cannot be called upon to provide more care than they freely would in return for payment.

28. For the same reasons I would allow 10 daytime hours paid care for each day of the week during the school holidays. It was contended for the defendant that an allowance should be made for 4 weeks a year when Khazar is likely to spend 2.5 hours a day, on 5 days a week, at holiday play-schemes. Mrs Conradie gave evidence that there are play-schemes which are designed for children with severe and complex needs, including children with gastrostomies. She found that Khazar is a very sociable child and gets his message across very well. She thought that it would benefit Khazar to be in a different environment to home and school and to interact with other children without his carer at his shoulder. I accept that it may be in Khazar's interest to attend play-schemes. However, Mrs Conradie said that the ratio of carers to children at play-schemes varies enormously and they have bands of volunteers. In my view, there is no guarantee that any play-scheme which Khazar attends will have a carer who is happy to feed him by gastrostomy tube. Dr Rosenbloom gave evidence that it is not difficult to feed by gastrostomy tube, but that there is a quite marked lay perception that it is unusual and difficult and there is a reluctance to get involved, which it is not easy to get over. Mrs Conradie agreed that if Khazar cannot communicate his needs or wishes it can lead to difficult and challenging behaviour, and it is clear that he gets his message over more readily and reliably to those who know him and can interpret his limited speech and his signing. Attendance for only four weeks in any given year with a number of play-scheme staff,

some voluntary, does not allow much time for them to acquaint themselves with Khazar's attempts at communication. All this convinces me that Mrs Sargent was right to believe that Khazar should have his own carer if he goes to a play-scheme. So attendance will not involve any saving of cost.

29. It was agreed that waking night care should be provided for the first year. Although, as I have already pointed out, Mrs Sargent spoke of there being no night care on Sunday nights, and the rotas show night care coming and going on both weekend nights, I consider that Khazar is entitled to waking night care for 7 nights a week for this first year without literally and metaphorically calling on his mother and father.

30. The proper hourly rates for day and waking night care were in issue. Mrs Sargent allowed £10 an hour during the week and £12 an hour at weekends, which are the rates which Mr and Mrs Iqbal pay now. Mrs Sargent said that those were the rates she was paying in the area where the family lived. Mrs Conradie thought those rates were too high. She advises a family in Chelsea, who pay £9.50 and £10.50, and those were the rates which the defendant argued to be reasonable. However, Mrs Iqbal said that they had been unable to recruit and keep carers at £8.50 and £9.50, so they went straight to £10 and £12 and they had a good response and got carers with whom they were happy. Mrs Theresa Messenger who has been Mr and Mrs Iqbal's case manager for several months said: "It would be nice if one could do it for £9.50 and £10.50 in Epsom, but you can't do it". There had been two attempts at recruiting since she had been involved with Khazar. She had not been involved in an attempt to recruit at less than £10 and £12, but it had been "good" since they offered those rates. Mr Spencer pointed out that no attempt had been made to engage staff at £9.50 and £10.50, but I do not believe that there is any obligation on parents in the position of Mr and Mrs Iqbal to creep up pound by pound in the hope of saving the defendant a pound or so an hour. They are entitled to shorten the process by offering a good rate. In my judgment, the evidence of practical experience points overwhelmingly to £10 and £12 being reasonable rates which it is necessary to pay in order confidently to achieve the required continuity of competent, willing carers.

31. Then there were issues about "on costs" and ERNIC. These issues are difficult to decide because Mrs Sargent and Mrs Conradie took very different routes to their conclusions and there was a distinct lack of evidence to support some of their figures.

32. Mrs Conradie's approach has the attraction of simplicity. She allowed £10 per week for carers' "additional household/leisure costs" and £84 a year for insurance. All other on costs including ERNIC were covered by a 27% uplift in the 52 weeks a year wage bill. However, she had calculated the figure of 27% with an accountant, and she could not explain how it was reached.

33. Mrs Sargent's approach was to say that for every 52 carer weeks that were actually worked, pay was required for 59. First, she had to allow for 4 weeks a year holiday. Then carers were paid double time on 8 Bank Holiday days a year, in effect adding 8 days. Then she paid sick pay as a matter of good practice to help recruit and retain staff, although it was not required by statute. Mrs Sargent allowed 6 days for this, which, with the Bank Holidays, added a further 2 weeks, making 58 so far. That 58 weeks had been what she had allowed until some time ago, but now she had to allow 3 days for training which was required by law (training for inducting new carers, manual handling training, appraisals and other staff training). In all she allowed a

further week for training: hence her total of 59 weeks which was the figure she used when working for Primary Care Trusts. She then added ERNIC at 12.8% of a proportion of the wage bill, thus calculated, to which she added additional annual costs of food and outings for carers (£2,080, at £40 per week for 52 weeks), recruitment costs (£1,200), insurance (£87), cost of training courses (£2,000) and payroll costs (£400)

34. Quite apart from the difficulty presented by Mrs Conradie's inability to explain how she and the accountant reached the figure of 27%, I prefer Mrs Sargent's approach to on costs because it is more likely to reflect the actual costs which will be incurred, in my view. This is the conclusion which Lloyd-Jones J. reached in the similar case of *A v. B Hospitals NHS Trust* [2006] EWHC 1178 (QB) at paragraph 81. However, the defendant challenged this calculation as a week too long and in my view it is a week too long. The allowance of 6 days a year sick leave seems excessive to me, and although some training must be essential I can see no justification for increasing the 3 days a year compulsory training and assessments in a relatively simple case of one patient. It was accepted that training to feed by gastrostomy tube was relatively simple and achieved by a new carer watching an experienced carer feed Khazar, and I would have thought that the same methods under the supervision of an experienced carer or Case Manager would apply to all other necessary tasks but with special attention to transfers and lifting. In my view comparison with the training requirements of a NHS Trust which has many patients, who may turn out to be different to each other in important respects, may be misleading. For these reasons I judge that the annual pay for carers should be calculated on a 58 week basis. I note that a different expert for the claimant claimed 58 weeks in *A*, decided only 6 months ago, which Lloyd-Jones accepted, and although I must decide this case on the evidence in this case, it is some comfort to come to the same conclusion as he did. It is undesirable that different judges should be deciding such matters differently on very similar evidence within a short compass of time. A limited annual amount is at stake, but it is not insignificant, and it mounts up over a long multiplier.

35. The next difficulty arises from the way that Mrs Sargent allocated her 59 weeks between term-time and holidays. Whereas Mrs Conradie allowed 43 term-time weeks and 9 holiday weeks in her 52 week calculation, Mrs Sargent allowed 42 term-time weeks and 17 holiday weeks in her 59 week total, thereby adding the bulk of the extra weeks to holidays when care is more costly. Assuming, in the lack of actual evidence, that term-time, excluding half-terms, last 39 weeks and that school holidays, including half-terms, last 13 weeks, there are three of the former to one of the latter, which indicates that 4.5 of the extra 6 weeks should be allocated to term-time rates (total 43.5 weeks) and 1.5 (total 14.5) to holiday rates.

36. The consequent reduction of Mrs Sargent's costings makes it difficult to judge what the proper ERNIC figure should be, according to her method of calculation, but there is a greater difficulty. I have re-read Mrs Sargent's reports and my notes of her evidence attempting to justify her calculation of ERNIC. Her calculation was based on an attempted separation of the four main carers from those who were likely to have other employers, and taking the main workers' personal exemptions into account, but the arithmetic was never explored and I regret to say that I cannot follow the bare reasoning to the eventual figure of £5,091 for this first year. Mr Taylor, perhaps wisely, did not try to explain it to me, but he and Mrs Sargent did point out that

ERNIC of £4,715 was paid for the 8 months from January to August 2006, and the full complement of carers was still filling up to an eventual 8 during that time. On the other hand the rotas did not perfectly follow the care regime promoted by Mrs Sargent. Nevertheless it seems highly unlikely that Mrs Sargent's calculation over-estimated the ERNIC payable, in the light of what was actually paid during that 8 months, and on this broadest of bases I allow the sum of £5,091 under this head.

37. Mrs Sargent's estimates of other costs were said to be based on experience but wildly more than Mrs Conradie's so far as food and outings were concerned. Having spent so much time in supermarkets and on outings myself I would put the necessary expenditure at £25 per week for 52 weeks (£1,300). I can see no justification for £1,200 for recruitment in this first year, or thereafter for that matter, now that it has been largely successful, and I allow £400 which should be ample if a carer leaves now and again. I compromise the figure for insurance at £85. I have cut training by half in terms of time and I find it difficult to see how such a large sum as the £2,000 a year which Mrs Sargent claims can be justified for training Khazar's home carers, whatever the position may be with NHS Trust staff. The estimate was not explored in evidence, and I allow £600 a year. With an active Case Manager, to whom I will come, and Mrs Iqbal doing the rotas as I expect her to continue to do, within the compass of her normal parental care, I could not at first see a significant cost for making the payrolls. However, it is clear from what I consider to be legitimate comments on this judgment in draft that the making of payrolls and supporting documents is a more technical and extensive exercise that I had thought, and certainly not something which Mrs Iqbal could be expected to do, and I allow the claim of £400 a year under this head, leading to a total of £2,785 for all these additional costs.

38. The award for future care for the first year, age 9.5 to 10.5 (Phase 1), discounted to 0.98 at the agreed rate of 2.5% per annum is, therefore, £80,119. The detailed calculations for this phase and all later phases are set out in the appendix. This figure does not include case management, to which I will return separately.

39. Moving on in age, Mrs Sargent and Mrs Conradie disagreed on care packages in a number of respects. They worked in phases of round figure ages to the end of Khazar's secondary schooling, for instance to 12 or 13 or 19, treating Khazar as 9 at the time of trial, as he just about was when they wrote their updated reports. I have adapted these age marks to 11.5 and 12.5 and 18.5 and so on, in accordance with the approach which I have previously canvassed (see paragraph 12). Mrs Sargent took the next future care stage from 10.5 right through to the end of Khazar's secondary education, which I have taken to be 18.5. During that period she assumed that Khazar would be attending school on a daily basis, and would need a single paid carer to 12.5 and a second paid carer for part of the day thereafter, but would need a sleep-in night carer rather that a waking night carer. Mrs Conradie allowed for a night sleeper for the years 10.5 to 12.5, that is for two years after the first year, but contended that Mr and Mrs Iqbal could and should look after nights thereafter. She agreed that a second carer would be needed from time to time from puberty at the age of 13, but contended that Mr and Mrs Iqbal would act as the second carer when required, while Khazar is at home. She worked on the basis that he would be at boarding school from the age of 11.5. The experts had different plans from the end of Khazar's secondary education.

40. Before looking at the figures in detail, it is convenient to decide the three main issues of approach between the ages of 10.5 and 18.5 inclusive.

41. I will take night care while Khazar is at home, first. There is no doubt that Khazar has slept better and better with time. Until April 2005, he was frequently sleeping in his parents' bed so that they could comfort him. He was weaned away from that as waking night care came in. Much time was spent at trial scrutinising the night diaries, particularly for July 2006, and it was clear that by then he was waking only once or twice a night, hot though July was, and that a significant number of disturbances appeared to be related to the gaiters which he wears at night and which may not be necessary for much longer, depending on his specialist's view of the balance between any benefit in avoiding contracture and any disadvantage from disturbed sleep. When he did wake in any discomfort, it was easy to settle him back to sleep, often for the rest of the night.

42. Against this background, Mrs Conradie allowed for a night sleeper for two years after the first year, as Khazar continued to settle. Then she stopped night care until Khazar was an adult and returned from college at 22 or 23 (21.5 or 22.5 now). She said that night care is usually provided for a youngster by his parents. Khazar is very severely disabled but his nights have improved very quickly, and his waking night carer retired from his room to a carer's room from the end of July 2005, three months after he stopped sleeping in his parents' bed. So she took the view that he was going to settle quite quickly to a much more settled pattern of nights, and from 12 (12.5) he will sleep undisturbed through the night save on very odd occasions. After Khazar's return from college, it would not be the expectation of someone his age to have his parents care for him at night, and the new baby will be 14, so she allowed for night care again.

43. Mrs Iqbal agreed that Khazar's disturbances at night were gradually settling down, but she said that he got stuck on his tummy and could not turn when he wanted to and he cannot reposition his duvet without help. She would not be happy to go back to night care which she and her husband did for so long, now that they have had a night carer. "It is very stressful and tiring getting up," she said. Dr Rosenbloom acknowledged that Khazar was settling and would continue to do so after the first year of waking night care. But he stressed that even in his teens he will have physical and learning disabilities, so that he cannot react in an appropriate way. He also has health difficulties, a gastrostomy and risk of epilepsy. He will never be able to get up to the lavatory or get himself a drink or adjust his bedding or help himself if he gets "stuck" at night. Dr Rosenbloom did not think that his sleeping would ever settle down to the level of a child or person with no brain damage. He believed that he should have an adult to care for him when he is in bed at night. He could only guess how many nights he would need help but it would be an unusual night if he required attention more than twice. Dr Thomas said that he did not disagree with anything Dr Rosenbloom said save that there were already some nights when Khazar was not waking at all.

44. In my judgment the reluctance to reassume night care which Mrs Iqbal expressed for herself and her husband is perfectly reasonable, however much Khazar's sleeping has improved. It follows from the evidence which I have summarised that although Khazar may have many undisturbed nights there will always be a risk that he will wake and require attention once or twice. This will require whoever is responsible for him to get up and tend to him. The disturbances will probably be short, but I do not consider it reasonable that Mr or Mrs Iqbal be constrained to bear the burden of them

against their wishes. I therefore find that Khazar is entitled indefinitely to an outside, paid, sleep-in night carer after the next year of waking night care.

45. The next issue is whether Khazar will board at school or college, and if so when, or continue to attend day by day. The defendant assumed that he will board from the age of 11.5 to 18.5, on the basis that he will attend Treloar's school to 16.5 and then Treloar's college to 18.5 and that Treloar's has so much to offer outside normal school hours that it will be in his best interest to board and that his parents will do whatever is in his best interest whatever they may feel about not wanting him to board at all. The claimant's representatives contended that the parents' wishes were paramount and that meant boarding was not in prospect.

46. I heard or read undisputed evidence that the facilities at Treloar's are excellent and that it has a wide range of evening activities which Khazar would miss if he did not board. Mrs Conradie said that a large proportion of children at Treloar's (110 out of 147) board, although children who live locally tend to go daily as they can join in the evening activities. By locally she meant in or on the outskirts of Alton. When Mrs Iqbal made her witness statement in December 2005, she and her husband hoped that Khazar would be able to attend Treloar's at the age of 11 because Ingfield Manor was only licensed to take children to that age, but that might require them to move again to be closer to Treloar's as they did not want him to board. In fact, by the time of the trial Ingfield Manor had been licensed to take children to the age of 16 or 18. Mr and Mrs Iqbal want him to stay there as they are happy with the school; although Treloar's has a unit which uses some principles of conductive education, Ingfield Manor is based on those principles. In my judgment Khazar will probably stay at Ingfield Manor for as long as he can, but the same considerations apply to Ingfield Manor as to Treloar's so far as the question of boarding is concerned. No doubt Ingfield Manor will have evening activities which it would be in Khazar's interest to attend, and the road journey is the essentially the same to both establishments from home in Epsom. At trial, Mrs Iqbal said that if they were told that it was in Khazar's best interest to board they would not stand in his way for their own interest, but they would not want him to board. Mrs Sargent did not think that she could give an opinion on whether Khazar would board; there were conflicting factors. Mrs Conradie said she did costings on the basis that Khazar would board because she thought that it was in his interest and his parents had told her that they were considering Treloar's and considering boarding. No doubt they were, but not willingly in my view, having seen Mrs Iqbal give evidence on the point. Mr Reid and Dr Lansdown agreed that: "There is a case for Khazar to attend school on a residential basis in order that he can have an extended curriculum which would address his independence and social needs. However placement within a residential setting would be dependent upon Mr and Mrs Iqbal's views on the matter." It is common round that there is no question of Khazar boarding if they are will not agree to him doing so.

47. In my judgment, in the light of all this evidence, it is very unlikely that Khazar will board at Treloar's or Ingfield Manor from the age of 11.5. He will still be very young, significantly under-age as he is in terms of understanding and maturation of personality, and I cannot see Mr and Mrs Iqbal changing their antipathy to him boarding over such a relatively short time scale. However, I believe that the pressure will grow to let him board on a weekly basis in order to take part in as many activities as possible outside day school hours as he grows older and his personality matures, as

Dr Rosenbloom believes it will. It is, of course, difficult to judge when the pendulum will swing in favour of boarding in the minds of Mr and Mrs Iqbal, but I judge that it is likely to do so when Khazar reaches the age of 16.5 and will progress from school to "sixth form" college if he is at Treloar's and will enjoy a similar opportunity at Ingfield Manor if it is licensed to take children beyond the age of 16.

48. The final important issue during the school years is the need for a second, paid carer. Mrs Sargent "recommended" that Khazar will need a second carer as he goes into puberty, to cover help with transfers to conform to statutory regulations. In her reports, she accepted that Mr and Mrs Iqbal will provide some help, but took the view that they cannot be expected to be the second carer in future for all transfers. She allowed 4 hours a day, 7 days a week, for the second carer and added ERNIC. At trial she said that Khazar would be getting bigger from the age of 13 and would need more transfers and would need two carers for all transfers, even though a hoist is required by the relevant regulations, and his parents would not be able to help with all of them, she said.

49. Mrs Conradie's evidence, in her reports and at trial, was that the need for a second carer from puberty will be occasional, here and there, and that the parents will often be involved in all the activities which involve transfers. She increased the amount of paid parental care to cover their increased involvement. She also increased her allowance for other expenditure to £20 a week.

50. I do not doubt that Mr and Mrs Iqbal will find themselves willingly involved in some "two carer" activities, including some transfers where their part will be to reassure Khazar if he becomes agitated, as they do at present, and that the time spent doing this will be no more than the time they would spend reassuring or helping an uninjured child in one situation or another. But I do not consider it legitimate to incorporate them in the care plan as paid carers, beyond this. I consider it reasonable for Mrs Sargent to allow for a second paid carer for 4 of the 10 Saturday and Sunday and holiday hours which the first carer will be working. At first blush, it may seem odd to allow the same hours for a second carer during term time weekdays when the first carer will only be working 4.5 hours a day, but the main transfers will be during those 4.5 first paid carer hours, getting Khazar up and dressed in the morning and bathed and to bed in the evening. I therefore allow for a second paid carer in accordance with the plan put forward by Mrs Sargent. I can see that there may be some small extra cost of food and outings, so I raise this cost to an average of £30 a week, thereby increasing "other expenditure" by £260 p.a.

51. It follows that the next phases of future care are from 10.5 to 12.5 when a single carer, including a night sleeper, is sufficient (Phase 2), and from 12.5 to 16.5 when a second carer is required for periods, but while Khazar attends school on a daytime only basis (Phase 3), and from 16.5 to 18.5 when he attends as a weekly boarder (Phase 4).

52. In the course of the trial, the sleep in night care rates were agreed at £60 for each weekday night and £72 for each weekend night, making a total of £444 a week.

53. Mrs Sargent calculated ERNIC at £1,628 on a proportion of the second carer's pay. Although she did her calculation on the basis of a notional 59 week year, and I allow 58, I accept her figure as a reasonable estimate for the reasons given in paragraph 36 of this judgment.

54. The award for future care for the two years from age 10.5 to 12.5 (Phase 2), is therefore £64,586 p.a. or, discounted to 1.87, £120,776 as a lump sum, and the award for future care for the four years from age 12.5 to 16.5 (Phase 3), is £83,642 p.a. or, discounted to 3.5, £ 292,747 as a lump sum.

55. Turning to Khazar's boarding years from age 16.5 to 18.5 while still at school (Phase 4), I follow the same scheme as in Phase 3 so far as weekends and holiday and half-term weeks are concerned. I can see no basis for the defendant's suggestion that Mr and Mrs Iqbal will want to do more for Khazar on term-time weekends, by taking over night care and doing more for him during the day, in order to compensate him for being away during term-time weeks, thereby using less outside, paid care at weekends, save that I expect them to take an active part in preparing him to leave on each term-time Monday morning and to want to make a real contribution to his reception and care on his return on Friday afternoons.

56. I accept Mrs Conradie's estimate that paid care will be required for only 2 hours on Monday mornings and 2 hours on Friday evenings during boarding weeks, in the light of the comment which I have just made, but those hours will be busy and heavy with transfers, so I allow a second carer for all 4 hours. I leave the additional expenditure at an average of £30 a week as there will be less food consumed and little difference in outings during term-time but more expensive outings during holidays as Khazar gets older.

57. Mrs Sargent's calculations for Phase 1 allowed ERNIC of 12.8% on about two-thirds of her carers' total pay, which I accepted, so I add ERNIC of 12.8% on 67% of the total pay for Phase 4.

58. The award for future care for the two years from age 16.5 to 18.5 (Phase 4), discounted to 1.62 is, therefore, £55,628 p.a. or, discounted to 1.62, £90,117 as a lump sum.

59. The next stage (Phase 5) is from the age of 18.5 to the end of Khazar's further, college education. Mr Reid and Dr Lansdown agreed that Khazar is likely to go to residential college at the age of 19 (for which I read 18.5), and that the course is likely to last 2 or 3 years. I was told that the purpose of this further education will be to enable Khazar's development to continue at his slower rate and therefore over a longer educational period. I can see the good sense of this, but there is no evidential basis upon which I can conclude that 2 years is likely to be insufficient for this objective and that he will be likely to benefit from a third year, paid for out of public funds. I conclude that the course is likely to last 2 years in Khazar's case.

60. Mr Reid and Dr Lansdown agreed that unless there is a significant change in government policy the fees at residential college will be met by the Learning and Skills Council ("LSC"). They suggested an indemnity to cover possible costs if there is a change, However, there was no evidence to contradict Mrs Conradie's testimony at trial that the LSC would pay the fees and that the one to one care which Khazar will need while at college will be the responsibility of the local authority and the LSC together. A suggestion that Khazar's own, employed carer would accompany him into college seemed to me to be impracticable and it was not pursued.

61. The essential difference between boarding school during Phase 4 and residential college is that Khazar will be at residential college for the whole term, with no weekends or half-terms at home. Mrs Conradie contemplated 14 holiday weeks a year at home, when paid or parental care will be needed, and I do not remember this being challenged. She allowed an average of 11 hours agency carer input at £15 an hour over 7 days a week, including an hour of double-up each morning for Khazar's personal care. She added 4 hours a day of paid, parental care, 7 days a week. She allowed £20 a week for carers' food and £20 for their leisure expenses with Khazar, a total of £40 per week. She continued to expect Mr and Mrs Iqbal to provide night care when required, as part of normal parental care. All this would mean an annual award of £19,180.

62. Mrs Sargent did not cost residential college years, as she had expected Khazar to have finished his education and to be back at home all year. Her weekly package for this, case management apart, amounted to about £2,500 per week. It consisted of 22 hours a day employed care (14 hours with 8 hours double up), and sleep-in care, with ERNIC on top at 12.8% of her usual two thirds of the total pay, plus food and leisure costs of £60 a week. All this would come to £35,000 for a 14 week year. Then she added recruitment, insurance, training and payroll costs amounting to just over £4,000 a year.

63. For the reasons of principle which I have already given, I cannot accept the incorporation of paid, parental care, or parental care, paid or unpaid, at night. Mr and Mrs Iqbal would have continued to give Khazar advice and guidance, and helped him to some extent to organise his life in various ways, had he not been disabled, after he reached 18, but that will be reflected in the attention they will give him, in my view by helping to organise his care regime, whatever form it takes.

64. In my view, Mr and Mrs Iqbal will want to retain the control which they presently have over employed carers, and which they would not have in the case of agency care. I believe that Mrs Iqbal will want to continue to organise the rotas in consultation with the carers and I do not, therefore, allow the uplift which Mrs Sargent included for a team leader among the employed carers. But in other respects I consider that Mrs Sargent's scheme for home care from leaving school is right and reasonable for residential college holidays. In particular her allowance of 14 hours a day employed care, plus 8 hours double-up, seems reasonable for an age when Khazar has reached or has nearly reached physical maturity. He will continue to need a sleep-in carer. I propose to raise the cost of carers' food and leisure activities with Khazar to a compromise figure of £50 per week, as suggested by Mr Taylor, but I see no reason to raise the costs of recruitment, insurance and payroll above the figures which I have allowed for earlier phases.

65. Adopting these approaches, the award for future care for the 2 years from age 18.5 to 20.5 (Phase 5) is £34,835 a year or, discounted to 1.54, £53,646 as a lump sum.

66. Once Khazar leaves residential college at the age of 20.5, his care package is likely to remain in essentially the same form for the rest of his life, in my view, although Mrs Conradie contemplated a division of the last phase at the age of 30, depending on the availability of local authority care. Both experts expected Khazar to be cared for in his own home. The essential differences between them were that Mrs Sargent expected Khazar to continue to be looked after by directly employed carers for the

periods and at the rates which I have described in my award for the holiday periods while he is at residential college, with no allowance for free local authority provision; Mrs Conradie costed for residential agency carers on 24 hour shifts, for 7 or 14 days at a time, with an hourly employed carer providing some relief during the day, and she made allowances for free attendance at local authority Day Centres for 5 hours on 3 days a week, and for 2 free local authority carers attending on Khazar at home for an hour each morning and an hour each evening (doubling up), or for direct payments from the local authority to buy 4 hours care a day.

67. In my judgment, Khazar's parents will continue to use directly employed carers throughout his adult years after leaving residential college, continuing to want to retain the control over his carers, which they will have become accustomed to over the years. In any event, there are real difficulties with the scheme of agency care which Mrs Conradie promoted. First, although the agency which she approached considered that it could provide residential care which conformed with The Working Time Regulations 1998 and The Working Time (Amendment) Regulations 2006, I do not believe that this is so in all respects, even if the carer works for 7 rather than 14 days at a time, opts out of regulation 4 (the 48 hour maximum working week), and is relieved by an employed or local authority carer for a few hours each day. In particular, the agency carer will not receive a rest period of not less than 11 consecutive hours in each 24 hour period as required by regulation 10(1); the night hours will not count towards this rest period as the carer will be on duty, and I do not share the agency's view that it would be saved from this provision because the carer would be working unmeasured working time for the purpose of regulation 20. I cannot fit an agency carer into the definition of unmeasured working time in the particular circumstances of Khazar's case. Second, and even if I am wrong in my construction of the regulations, the agency's own terms and conditions for "live-in Personal Assistants" provide for an 8 hour sleep period with no disturbances, and there will be night-time disturbances from time to time in Khazar's case. Third, and in any event, I do not believe that a 7 day carer would survive 7 days and nights in a row, even with some day relief, with the high dependency attention which Khazar will require, without becoming weary to the point of leaving or not returning for any further tours of duty or at least showing less energy and efficiency than he is entitled to.

68. Turning to local authority provision, Mrs Conradie gave evidence that when Khazar comes home from college he will be entitled to a full local authority assessment, and in her experience local authorities provide free assistance with care for "people like Khazar", as she put it. That care usually meant a minimum of 2 carers coming in first thing in the morning to get the patient up, washed, dressed – doing all the personal care, and to get him to bed at the other end of the day.

69. There are practical and technical reasons why I do not believe that Khazar will benefit from such care or from any local authority payment in lieu of it. I do not consider that it is possible to predict, so many years ahead, that the local authority will be prepared to provide home help even to that minimum level. There was certainly no evidence from the local authority that it would do so. Its response to a letter from the defendant's solicitors was non-committal, as one would expect. There will be budgetary considerations, but in addition the local authority will be making any assessment of a person who has had all the employed care he has needed for many

years and who has the funds available to purchase it in the future. I accept the argument made by Khazar's counsel that once he becomes an adult any provision for his care would be made pursuant to section 29 of the National Assistance Act 1948 and that whereas personal injury trusts and compensation for personal injuries administered by the court are to be disregarded for the purposes of section 22, the charging provision for accommodation provided under section 21, that is not the case so far as care provided pursuant to section 29 is concerned. It follows that there is no principled basis on which I am able to estimate what, if any, home care provision will be made by the local authority for Khazar in the future, and that in any event the local authority will charge for any provision which it may make.

70. These were the conclusions reached by Tomlinson J. in *Freeman v. Lockett* [2006] EWHC 102 and by Lloyd-Jones J. in *A v. B Hospitals NHS Trust* [2006] EWHC 1178 (QB), but there is another reason why I do not allow for any free local authority care for Khazar. I was very impressed by Mrs Iqbal and in particular by the active part which she has played, with the help of Case Managers in the organisation of employed care since interim funds have been available. During the trial she produced the rotas which she had prepared week by week, setting out the hours to be worked by the various carers. They were detailed and clear, and in my view Khazar's care will be much better organised in future if, with the help of Case Managers, she continues to organise his care by directly employed carers. It will make matters more difficult if local authority carers have to be incorporated into a scheme of directly employed carers, in my view.

71. Turning to the prospect of attendance at Day Centres, the evidence was contradictory. In her initial report, Mrs Conradie mentioned them, but she made no deduction from her care costings to take account of them. In her updated report in March 2006 she said that there would be Day Centre provision for 5 hours at a time on 3 days a week. She identified two centres as suitable and local. At trial she said that Day Centres would provide Khazar with necessary socialising. They would be offered by the local authority following its assessment. They had staff who were expert in providing care and it would not be necessary for Khazar to have his own carer which would inhibit contact with others at the centre. It is unusual to have one person attached to one patient, in her experience.

72. Mrs Sargent made enquiries of the two Day Centres identified by Mrs Conradie, and was told that one had no facilities for transfers or for changing Khazar; the other had no vacancies. They both had clients who had one to one carers, and, as with play-schemes, Mrs Sargent thought that Khazar would need his own carer with whom he could communicate.

73. There was no direct evidence from the local authority or either Day Centre and I do not consider that there is any evidential or principled basis upon which I can hold that Khazar is likely to enjoy attendance at Day Centre when he leaves residential college, in some 11 years time. I believe that he may be able to use Day Centres on an irregular "dip in and out" basis from time to time, but I do not have enough confidence in any significant attendance to make any allowance for it in assessing the cost of 24 hour care which Khazar will still need, or to be attracted by the defendant's offer of an indemnity to cover any shortfall which would be caused by reducing the care award for Day Centre attendance, only to find that Day Centres were not available to the degree contemplated in the award. Such an indemnity, assuming that

I could accept it, against the claimant's wishes, or achieve the same end by way of an undertaking, would mean sustaining the relationship between the claimant and the defendant, which is not attractive unless it carries real potential benefit, which it does not do in this instance in the light of my findings.

74. For the award for future care from age 20.5 to 41 (Phase 6) I therefore propose to follow the same scheme of care, at the same relevant rates, as for Khazar's holidays at home while attending residential college (Phase 5), and the award for the 20.5 years is £134,585 p.a. or, discounted to 12.33, £1,659,433 as a lump sum.

75. The figures which I have so far given for future care do not include the cost of case management, which it is agreed must be allowed for; nor do they include the uplift to £15 per hour for 35 hours a week in one daytime carer's pay which Mrs Sargent allowed from the age of 18.5 for acting as Team Leader.

76. Mrs Sargent justified the team leader's uplift on the basis that in any given week one of the carers would have to take responsibility for management of the other carers, keeping records and doing "on the job" training, beyond the management provided for a limited number of hours by the Case Manager. I do not believe the uplift is justified in Khazar's case. An allowance must be made for adequate case management and formal training, and in Khazar's case, for the reasons which I have already given, I expect Mrs Iqbal to continue to carry out the element of daily management and supervision which will be minimal as Khazar's care routine becomes established with time and add nothing of significance to the general household management which this particular mother will assume as part of running her household, in my view. The additional management involved in recruitment and settling down when a carer leaves should be dealt with by the Case Manager.

77. So far as case management is concerned, Mrs Sargent allowed for 120 hours at £75 an hour, plus £600 travel expenses at half time, for the first year (Phase 1), and 100 hours for each year thereafter until the end of Khazar's education. She wrote notes the evening before she gave evidence, to show how her total of 120 hours was reached for the first year. In my view, the notes were an attempt, no doubt honest, to justify her figures retrospectively. The extra 20 hours in the first year were attributed to appraisals and recruiting which she removed in subsequent years. She allowed for 150 hours for the first year after the end of Khazar's education, and 120 hours for each year after that. The bills for case management spoke of about 99 hours case management and 47 hours travelling in the period of heavy case management from October 2005 to August 2006 inclusive (11 months) which would work out at 108 hours management and 51 hours travelling for a complete and heavy year. The hourly charge varied but it was typically £70 an hour with travel costed at half time. Mrs Conradie allowed 60 hours case management at £75 an hour, plus 24 hours travel at £40 an hour, plus a mileage allowance, until Khazar finished his education. Thereafter she allowed 72 to 80 hours management and 18 to 30 hours travel plus mileage allowance.

78. With these conflicts between opinions and between opinions and practice, it is difficult to make a confident award. I cannot see any justification for a higher level of case management in Phase 1, now that the initial recruiting has been done and Khazar's current day regime is established. More case management will probably be required for the first year after he comes home from residential college, but less will

have been required for the two years before that while he is at college all term-time. More case management will be required, clearly, year after year, when Khazar needs employed care on every day of every week, after his education is completed. With these factors in mind I allow the compromise figures of 80 hours a year case management plus 40 hours travelling to age 20.5, and 100 hours a year case management and 50 travelling thereafter, all at £75 an hour, but half time for travelling and no mileage allowance. This means £7,500 a year for case management from age 9.5 to 20.5, and £9,375 a year from age 20.5 to 41. The total will be £186,919, after discounting at 2.5% a year, if awarded as a lump sum. The calculations appear in the Appendix.

79. The total award for future care is £2,483,757 if it takes the form of a single lump sum, thus:

Phase 1 (9.5 to 10.5)	£80,119
Phase 2 (10.5 to 12.5)	£120,776
Phase 3 (12.5 to 16.5)	£292,747
Phase 4 (16.5 to 18.5)	£90,117
Phase 5 (18.5 to 20.5)	£53,646
Phase 6 (20.5 to 41)	£1,659,433
Case Management	£186,919
Total	£2,483,757

Accommodation

80. The bungalow in Epsom was bought with funds from an interim payment, on the recommendation of the jointly instructed chartered surveyor, Mr David Reynolds, and the basis of the claim in accordance with *Roberts v. Johnstone* [1989] Q.B. 878, and ancillary issues were mostly agreed, before or in the course of the trial. However, six issues remain: whether an allowance should be made for the rent which Mr and Mrs Iqbal would have had to pay as rent for their own accommodation, but for the accommodation bought with Khazar's damages; what allowance should be made for the cost of accommodation which Khazar would have had to fund himself, once he left his parents' home, had he not been injured; what, if any, credit against additional maintenance costs should be allowed for the maintenance of the property which Khazar would have had in any event; what if any contingency fee for unforeseen costs should be included in the costs of future adaptations to the bungalow; whether the cost of a conservatory to cover the spa pool at the bungalow, and running, heating and maintenance costs for the pool, are recoverable, and whether the cost of disabled access to the raised garden of the bungalow is recoverable.

81. Mr Spencer's argument that an allowance should be made for any parents' notional rent while living rent-free in a home bought for a claimant without financial contribution by them, was that if they had been living in their own accommodation, as in *Roberts v. Johnstone* itself, they would have been obliged to give credit for the full

value of the property sold, even if the that property was still being paid for by way of mortgage instalments. So equivalent credit should be given where the parents' previous accommodation was rented rather than owned. The rent on Mr and Mrs Iqbal's previous home was paid via Housing Benefit because he was unfit to work, but he would still be entitled to Housing Benefit, or so Mr Spencer contended, if he entered a tenancy agreement with his son's representative. If Mr and Mrs Iqbal's previous landlord received rent from them or from the local housing authority on their behalf, after Khazar's injury but before he received any damages, why should Khazar not receive rent from them after his purchase of a home for all with his interim award? Although the claimant relied upon *M v. Leeds Health Authority* [2002] PIQR 84 and *Parkhouse v. Northern Devon Healthcare NHS Trust* [2002] Lloyd's Rep Med 100, to refute such an allowance, the judge in the first case gave no real reason for refusing the allowance according to Mr Spencer, and the second case related to removal expenses which had been allowed in the present case. Mr Iqbal was earning about £200 a week take-home pay before his back injury, out of which he paid rent of about £99, he said, until it was replaced by Housing Benefit in the same amount. So, Mr Spencer argued, £5,000 a year should be allowed against the accommodation claim.

82. These are powerful arguments of principle, particularly if Mr Spencer is right in saying that in *Roberts v. Johnstone* itself credit was given for the full value of the cottage owned by the claimant's adoptive parents and sold by them to contribute to the new accommodation, and despite a mortgage on the cottage. I can find no reference to a mortgage, and the judgment of the Court of Appeal refers to the cottage "realising £18,000" at page 889F and to its "sale price" of the same amount at page 889G, which does not make it clear whether there was a mortgage and whether it was taken into account if there was. However, assuming that Mr Spencer is right, the defendant in *Roberts v. Johnstone* does not appear to have made a claim that an allowance should be made for the mortgage repayments or interest which the adoptive parents would have to make but for the claimant's disabilities, and Mr Spencer's point was not argued.

83. In my view, Mr Spencer's argument fails for practical reasons in the circumstances of the present case. The fact is that Mr and Mrs Iqbal are not paying rent to Khazar or his receiver, whereas parents naturally tend to volunteer the proceeds of sale of any existing home towards the purchase of a more expensive, suitable house in which to live with the claimant, as Mr and Mrs Woodward did in *Roberts v. Johnstone*. Both *M* and *Parkhouse* remind us that the claim is the claimant's claim, not that of his parents, and the allowance which Mr Spencer claims could only be justified, in a round about way, by finding that Khazar had (via the Court of Protection or his receiver) failed to take reasonable steps to mitigate his loss in relation to accommodation by, in turn, failing to demand "rent" from his parents. In my view the failure to demand rent cannot be castigated as unreasonable. In the specific circumstances of this case it would involve granting some form of licence or demanding "rent" in order to try to achieve the handing over of money in the form of Housing Benefit from one public body simply to save another public body the same amount. More generally, it is not just to deprive parents of the incidental benefit of living rent free, when there are so many sacrifices on their part, most obviously the detriment to their quality of life, which must go uncompensated under our law of tort, however high the award in their child's favour.

84. I do not, therefore, allow the allowance for parents' "rent" which the defendant claims.

85. It is common ground that an allowance must be made for what would have been the cost to Khazar of his own accommodation, in due course, had he not been disabled, but there are serious differences as to the proper approach.

86. The claimant's representatives took the value of a first time buyer's property in and around London at £180,000 as estimated by Mr Reynolds. They argued that Khazar would have bought such a property at the age of 30; that with average gross earnings of £25,000 p.a. (the equivalent of the net multiplier of £18,880 which was agreed for the loss of earnings claim), and banks and Building Societies offering mortgages of 3.5 x gross earnings (£87,500) it would have been impossible for Khazar to have financed the purchase on his own home, and he would have shared the cost of a home equally with a partner. It followed that the credit against the cost of the Epsom bungalow was £90,000, at 2.5% p.a. (£2,700) from age 30 for the purpose of the *Roberts v. Johnstone* calculation.

87. The defendant argued for the whole cost of a £200,000 home from the age of 18, that is £5,000 p.a. at 2.5% p.a. That was, at just under 28%, a reasonable proportion of Khazar's putative net earnings of £18,880 a year.

88. I believe that I am entitled to take judicial notice of the fact that some lending institutions are now prepared to go to 4.5 or even 5 times gross earnings, and that many wives or female partners go out to work to enable loans to be effected and mortgage payments made, but that even in today's society the advent of children gives them less consistent earning power, generally speaking, than the man of the house. In an area where there must be great uncertainty about the future so far ahead, I must nevertheless make a decision on the basis of what is likely. In my view, coming from the family which he does, Khazar would probably have lived at home rent free, until about 25, which would have enabled him to accumulate some savings before beginning to pay rent or taking on an equivalent capital burden. At 4.5 times £25,000 he could raise £112,500. He and his partner might have saved £7,500 between them, leaving her to carry the burden of financing one–third of the capital cost of a starter home costing £180,000, all of which sounds reasonable to me. I appreciate that this makes no allowance for a more expensive home later on, but with net earnings of £18,800 in Greater London Khazar would be pushed to service a more expensive home, in my view. He and his partner might have been forced to buy a first home for less than the average of £180,000 before going on to a house costing more than £180,000 later on, but it is fair to take the average cost as £180,000.

89. Although Mr Spencer might be correct in arguing that it is more realistic to deduct the resulting annual cost to Khazar from his claim for loss of earnings, the allowance is normally and conveniently made as part of the *Roberts v. Johnstone* calculation and that should be done in this case.

90. The defendant contended that from the age when Khazar would have incurred maintenance costs on his own property a deduction of £500 should be made from the annual maintenance cost of £2,500 at the bungalow in Epsom. However, Mr Reynolds had estimated that the annual cost of maintaining the bungalow was in the region of £2,850, from which he deducted £350 as his estimate of the costs of

redecoration, of a modest flat presumably, which Mr and Mrs Iqbal would have had to bear in any event. In my view, the cost of maintaining the house which Khazar would have purchased sometime during the year when he was 25 would have been more than the cost of mere decoration of Mr and Mrs Iqbal's flat. The sum of £500 put forward by the defendant is modest, even allowing for a fair amount of DIY. I therefore allow a further £150 a year against the annual maintenance costs of the bungalow, but from age 25.5 only, at a multiplier of 8.79. This reduces the accommodation award by £1,318.50.

91. The further adaptations which are planned to the bungalow in accordance with Mr Reynolds' advice are limited in extent and seriousness. Accepting, as I do, his evidence that it is normal to add 10% to cover the prospect of the discovery of the need for extras as work progresses, and that such an additional sum was in fact used in modest earlier works, it seems to me that the limited nature and relative simplicity of the works which are now contemplated in a property which looks fairly new from the photographs demand an addition of 5% but no more. An apparent issue over credit for betterment arising from the further adaptations was resolved.

92. The bungalow came with an outdoor, uncovered spa pool or hot tub as it was variously described, and a claim is made for the cost of covering it with a conservatory or enclosure and of then heating and maintaining it so that it can be used by Khazar in all seasons. Mr Reynolds put the estimated cost of the conservatory-style enclosure at £31,000, plus contingency allowance, and the additional running, heating and maintenance costs at £1,750 a year. There is no doubt that Khazar enjoys and will continue to enjoy being in swimming pools, when access to them is available, and I do not doubt that he would enjoy using a spa pool so conveniently placed, if put in it by his parents or carers, but Dr Rosenbloom gave evidence that the spa pool would be for sociable and pleasurable rather than therapeutic use, and Dr Thomas agreed. Mr Taylor accordingly accepted that provision of a conservatory to use the spa pool would not be for therapeutic benefit, but he nevertheless argued that it would be reasonable to allow the "relatively modest" costs involved for two reasons. First, Khazar has been deprived of many normal leisure activities by the defendant's negligence, and the spa pool would provide ready access to an alternative recreational activity at home. Second, it is likely to increase Khazar's quality of life significantly and it would be a shame not to use it, given that it is there. The latter argument came very close to ignoring the doctors' evidence, and if the cost appears "relatively modest" to the family and the compensatory effect so far as loss of amenity is concerned is appears so significant, then there is no reason why the necessary work and maintenance should not be funded out of the damages which Khazar will otherwise receive. In fact, I doubt the use which the spa pool would get, even if covered, since Mrs Iqbal told me that it was not used even during the July heatwave when the ambient temperature must have made it attractive but when she, a non-swimmer like Mr Iqbal, thought the water still too cold. However this may be, the doctors' evidence means that the defendant should not have to pay for enclosing, heating or maintaining the pool.

93. The final disputed part of the claim for accommodation relates to the cost of providing access to the grassed part of the garden. There is an area of paving behind the bungalow which Mr Reynolds put at 50 feet by 15 feet and which he described as excavated from the higher area of the garden. There is a paved area of about the same

size at the front of the bungalow. Both paved areas are easily accessible for Khazar, but the remainder of the back garden consists of a higher area of grass and beds, again about 50 feet by 15 feet, which can only be reached by a number of steps. I accept that it is unreasonable to expect anyone to carry Khazar up those steps, and Mr Iqbal, in particular, wants him to be able to get to the grassy area when others, including his visiting cousins, are enjoying it, so that he can join in the fun. Mr Reynolds has looked at possible means of access. A ramp would be very long and expensive because of the difference in levels, but an effective step-lift could be provided for about £8,000 to £10,000. I find this claim more difficult than the spa pool, but I have come to the conclusion that the claimant's case for it has not been made out because the areas to which Khazar does have access are enough to make the bungalow suitable for his needs without access to the grassy area. It follows that the defendant should not have to pay for access to the grassy area.

94. Applying these findings to the agreed elements of the accommodation claim, the award under this head amounts to £511,409.

The "Lost Years"

95. The claimant contends that he is entitled to damages to compensate him for the "lost years" of earnings and pension between his actual life expectancy and his life expectancy as it would have been but for his injuries. The defendant contends that such a claim is too remote in the case of an infant claimant who, as the result of his injuries, will not have dependants. Mr Spencer contended that the defendant's stance is supported by authority in the Court of Appeal, the House of Lords and the Privy Council, and by the learned chief editor and author of the relevant paragraphs 35-084 to 35-090 of the 17th Edition of McGregor on Damages; in so far as judges have made awards for lost years in recent years they have done so either by agreement of the parties or otherwise without full argument and consideration of the relevant authorities. Mr Taylor responded that earlier authorities did not support the full extent of the defendant's stance; that in so far as they did offer support they revealed an anomaly in the approaches to claims by adults on the one hand and infants on the other, which it was no longer necessary to perpetuate in the light of advances in the calculation of damages for future losses.

96. For many years before *Pickett v. British Rail Engineering Ltd* [1980] A.C. 136, the law was held to be that assessment of damages should be based on post-injury life expectancy so there could be no award for the lost years. At the time of trial, Mr Pickett was 53 with an expectation of life of one year. He had first realised he was ill at the age of 51; he had contracted mesothelioma in the course of his longstanding employment by the defendant. But for the disease he would have worked on until the age of 65. The House of Lords held that he (or his estate since he died five months after the trial, leaving a widow who was 47) was entitled to recover damages for loss of earnings during the lost years, computed after deduction of his probable living expenses during that period. Lord Wilberforce said, at page 150 C-E:

> "…in the case of the adult wage earner with or without dependants who sues for damages during his lifetime, I am convinced that a rule which enables the "lost years" to be taken account of comes closer to the ordinary man's expectations than one which limits his interest to his shortened span of life.

> The interest which such a man has in the earnings he might hope to make over a normal life, if not saleable in a market, has a value which can be assessed. A man who receives that assessed value would surely consider himself and be considered compensated – a man denied it would not. And I do not think that to act in this way creates insoluble problems of assessment in other cases. In that of a young child (cf. *Benham v. Gambling* [1941] A.C. 157), neither present nor future earnings could enter into the matter: in the more difficult case of adolescents just embarking upon the process of earning (cf. *Skelton v. Collins* (1966) 115 C.L.R. 94) the value of "lost" earnings might be real but would probably be assessable as small."

Lord Salmon agreed, but did not entirely exclude a claim on behalf of a child, saying at pages 153F – 154A:

> "One of the factors which, however, the common law does not, in my view, take into account for the purpose of reducing damages is that some of the earnings, lost as the result of the defendant's negligence, would have been earned in the "lost years". Damages for the loss of earnings during the "lost years" should be assessed justly and with moderation. There can be no question of these damages being fixed at any conventional figure because damages for pecuniary loss, unlike damages for pain and suffering, can be naturally measured in money. The amount awarded will depend upon the facts of each particular case. They may vary greatly from case to case. At one end of the scale, the claim may be made on behalf of a young child or his estate. In such a case, the lost earnings are so unpredictable and speculative that only a minimal sum could properly be awarded. At the other end of the scale, the claim may be made by a man in the prime of his life or, if he dies, on behalf of his estate; if he has been in good employment for years with every prospect of continuing to earn a good living until he reaches the age of retirement, after all the relevant factors have been taken into account, the damages recoverable from the defendant are likely to be substantial. The amount will, of course, vary, sometimes greatly, according to the particular facts of the case under consideration."

Lord Edmund-Davies, at page 162C, commented that the consideration of the House in *Pickett* related:

> "solely to the personal entitlement of an injured party to recover damages for the "lost years", regardless both of whether he has dependants and of whether or not he would (if he has any) make provision for them out of any compensation awarded to him or his estate."

Lord Scarman, at page 168D, said that full compensation was the object of the law. He listed the six main objections to a lost years claim, describing various of them at page 169E-F and continuing at pages 170A-G and 171A, as follows:

> "First, the plaintiff may have no dependants. Secondly, even if he has dependants, he may have chosen to make a will depriving them of support from his estate. In either event, there would be a windfall for strangers at the expense of the defendant. Thirdly, the plaintiff may be so young (in *Oliver v. Ashman* [1962] 2 Q.B. 210 he was a boy aged 20 months at the time of the accident) that it is absurd that he should be compensated for future loss of earnings……Fifthly, what does compensation mean when it is assessed in respect of a period after death? ……..The law is not concerned with how a plaintiff spends the damages awarded to him. The first two objections can, therefore, be said to be irrelevant. ……..The third objection will be taken care of in the ordinary course of litigation: a measurable and not too remote loss has to be proved before it can enter into the assessment of damages. ……..There is, it has to be confessed, no completely satisfying answer to the fifth objection, but it does not, I suggest, make it unjust that such damages should be awarded. The plaintiff has lost the earnings and the opportunity, which, while he was living, he valued, of employing them as he would have thought best. Whether a man's ambition be to build up a fortune, or to spend his money upon good causes or merely a pleasurable existence, loss of the means to do so is a genuine financial loss. The logical and philosophical difficulties of compensating a man for a loss emerging after his death emerge only if one treats the loss as a non-pecuniary loss – which to some extent it is. But it is also a pecuniary loss – the money would have been his to deal with as he chose, had he lived. ….I conclude, therefore, that damages for loss of future earnings (and future expectations) during the lost years are recoverable, where the facts are such that the loss is not too remote to be measurable."

97. Had the matter rested there, I would have thought it clear that the existence or potential for the existence of dependants, or lack of it, is irrelevant to a lost years claim by a living claimant; the test is remoteness, judged by whether the loss is measurable or not, and a lost years claim by a living infant of Khazar's age is not necessarily excluded. In *Croke v. Wiseman* [1982] 1 WLR 71, however, the Court of Appeal held that the infant plaintiff who was 7.5 years of age at trial with a life expectancy taken by the judge to be until the age of 40, was entitled to compensation for his loss of future earnings during the period that he was likely to live, but that since he would have no dependants he should not be awarded an additional sum to compensate him for the lost years of his life. After considering *Pickett,* Griffiths L.J., as he then was, said, at pages 82F-83D:

> "In the case of a child, however, there are no dependants, and if a child is dead there can never be any dependants and, if the

> injuries are catastrophic, equally there will never be any dependants. It is the child which will be dependant. In such circumstances, it seems to me entirely right that the court should refuse to speculate as to whether in the future there might have been dependants for the purpose of providing a fund for persons who will in fact never exist……. when one is considering the case of a gravely injured child who is going to live for many years into adult life…….there are compelling social reasons why a sum of money should be awarded for his loss of future loss of earnings. The money will be required to care for him. Take the present case. It is not a case where damages have been awarded which will provide a sufficient sum for him to go into a residential home and be cared for at all times….Damages awarded for his future loss of earnings will in the future be available to provide a home for him and to feed him and to provide for such extra comforts as he can appreciate…..I would, therefore, award this child a sum to compensate him for his loss of earnings during the period that he will live but I would not award any additional sum to compensate him for the lost years."

Shaw L.J said, at pages 84D-F and 85A:

> "For my part, I fail to see why there should be any difference in the principles which determine what are the bases for the recovery of damages whatever the age of the victim. The assessment of the measure of damages may be more or less difficult but the right of the plaintiff to an assessment of damages for that element of damage cannot be brushed aside. The obligation of the court to make the best assessment it can is not to be avoided by treating compensation for loss of future earnings in the case of a young child as being so speculative as not to deserve to be considered at all. On an actuarial basis a healthy child of two in a caring and comfortable home has a life expectancy of some 70 years. I can see no valid reason for assuming that such a child is unlikely to reach adulthood or to achieve the capacity to earn a livelihood…..This (the award made by the Court of Appeal for loss of future of future earnings) takes no account of the "lost years". I recognise the philosophical anomaly but will not seek to resolve it. I have had the advantage of reading in draft the judgement of Griffiths L.J. and am content to adopt his exposition of the practical justification."

98. Mr Spencer relied heavily on *Croke* as binding authority which eliminated any lost years claim in Khazar's case. He said that it was authoritatively endorsed by the Privy Council in *Jamil Bin Harun v. Yang* [1984] 2 WLR 668. It was certainly followed by the Privy Council so far as the legitimacy of a living infant's claim for loss of earnings up to anticipated death is concerned, but in that case the infant's life

span was not shortened. Mr Taylor asked why the obligation of the court to make the best assessment possible of a living infant claimant's loss of earnings, right up to the anticipated point of death, many years ahead, however difficult and even where he would have no dependants, should suddenly cease altogether upon his anticipated death.

99. What has happened since *Croke*? Dr McGregor, concluding the material section of his 17th Edition in 2003, said that no known claims by children for lost years damages had appeared over the last 20 years. Mr Taylor said that was not so. *Kemp & Kemp* referred to successful claims.

100. I leave aside the cases where settlements which included such claims have been approved by the court. The settlement figure may include items which a defendant would not concede if the case was fought but to which no exception is justified on a "swings and roundabouts" basis. The court ultimately looks at the total settlement figure, and no judge is likely to take exception to a generous concession by a defendant in an infant claimant's favour. This was no doubt the case in *Brown v. King's Lynn & Wisbech Hospitals NHS Trust* (20 December 2000, unreported), where Gage J., as he then was, made a modest award for the lost years in the case of an 8 year old claimant with an agreed life expectancy to age 30. In that case counsel for the claimant sought an award of just over £90,000 from a multiplicand of £14,000 on what I calculate to be a discounted multiplier of 6.56. Counsel for the defendant was prepared to concede a modest award of one year for the full multiplicand (see page 17A-D of the transcript). Gage J. referred at length to *Croke* and he also referred to *Housecroft v. Burnett* [1986] 1 All ER 332, (to which I was not referred, no doubt because the victim was 16 at the time of the accident) where the Court of Appeal held that the lost years were more than provided for in the award for loss of earnings which was made. However, it is clear from his judgment that Gage J. understandably approached the case as if the only issue as to lost years was how the claim was to be quantified, not whether it existed at all. For instance, apart from the concession of defence counsel, he recorded that counsel agreed that in most cases involving severely brain damaged babies there is usually a modest award to represent the lost years (21D-E). Mr Spencer disputes that, but Gage J was entitled to proceed on that basis, and he did so, concluding that any award for lost years in that case must remain a modest one, despite the argument of counsel for the claimant, and awarding £21,708 which was achieved by taking a full multiplicand and applying a multiplier of 2 years further discounted by 0.7894 for accelerated payment.

101. Gage J. also referred to the case of *Warren v. Northern General Hospital NHS Trust* (27 January 2000, unreported) where the Deputy High Court Judge took a surplus of 40% of earnings above living expenses to achieve the multiplicand and applied a much discounted multiplier to make an award of £8,700 in the case of an infant who was just 8 at trial with a life expectancy of a further 47 years. But I can find no trace of a challenge to the lost years claim as opposed to issues about its value.

102. I appreciate only too well that *Croke* is a decision of the Court of Appeal, but it was made on practical grounds as they were perceived to be nearly a quarter of a century ago. There is clearly an anomaly between the decision in *Croke* in respect of infant claimants with curtailed life expectancies, who will have no dependants, and the situation which prevails with adult claimants with curtailed life expectancies, who have no dependants and who for one reason or another are very unlikely to have them

in future or, even, are certain not to have them for one reason or another. The anomaly can not, in my view, be explained by relative ease or difficulty of measurement because that is not a bar to a lost years claim in the hands of a young, but adult, claimant with an uncertain work record and a long, albeit curtailed, life expectancy. In any event, difficulty of measurement did not guide the court in *Croke*. There is a further anomaly between the infant claimant's valid claim for loss of earnings before anticipated death, even over the last year or so before anticipated death, however far into future, and even where there will never be any dependants, and the lack of a claim for lost years even in the first few years after anticipated death, if the defendant's argument is correct. If loss of earnings can now be measured using the actuarial science behind the Ogden Tables, for the last few years of anticipated life, many years distant, as it clearly can, and it stands to be compensated, even where there are no dependants and never will be, then it can be measured for the years immediately thereafter. Any additional uncertainty can be allowed for in the calculation. It should not prevent the calculation. The practical justification which persuaded Griffiths L.J. and, ultimately, Shaw L.J. does not survive, in my view, in the case of today's awards to children who are grievously injured to the point of never being able to work or to look after themselves, and have a significantly abbreviated but still considerable life expectancy. Their damages provide them with suitable accommodation and suitable equipment and care to ensure as much comfort as it is possible to achieve by financial compensation. It is true that they need income to be fed, and that has to come from the award for loss of future earnings before anticipated death, and it is not required after anticipated death. But that is a relatively small consideration, and it is not today seen as any justification for limiting loss of earnings claims (before death) to what is required by the claimant as opposed to what he has lost in terms of net earnings.

103. I cannot accept Mr Taylor's argument that Khazar would probably have had dependants in the form of his parents in the later years of his life, had he not been injured; the evidence does not support such a situation and I cannot infer it from the family's general circumstances, but in my view if lack of dependants is irrelevant to the existence of a claim for loss of earnings within the life expectancy, it is irrelevant thereafter. For the reasons which I have given, I hold that Khazar does have a lost years claim.

104. Khazar's lost years will not start for another 31.5 years at age 41, and in my judgment they should be calculated to last for a further 24 years to retirement at 65. I allow £6,667 a year, being one third of the modest, agreed net earnings of £20,000, as available surplus over living expenses. I do not allow any lost years claim after retirement because I cannot find that Khazar would have had any measurable surplus over living requirements once put to surviving on a modest pension.

105. I am indebted to counsel for the claimant for the initial calculations thereafter. From Table 9 of the Ogden Tables, I take a working life multiplier of 17.5 which takes account of the risk of mortality from age 41 to 65. I discount this multiplier by a factor of 0.4651, for the accelerated receipt of 31 years, to 8.14. In my view, so far as the lost years claim is concerned, an additional discount should be made (despite the agreed life expectancy to 41) for the normal risk of dying between age 10 and 41, namely 2.34%. This leads to an additional discount of 0.9766, resulting in a

multiplier of 7.95 before any other reduction for contingencies other than mortality is made.

106. Counsel for the claimant contended that so far as contingencies other than mortality are concerned there is logically no reason to apply any higher discount to a lost years multiplier than would ordinarily apply to a loss of earnings multiplier, and that assuming medium risk employment, the appropriate discount for a 41 year old male to 65 is in the order of 5%. In my view that would make insufficient allowance for the real possibility of a claimant like Khazar losing his job through illness or redundancy etc. relatively early in the lost years, and finding it difficult to find alternative, admittedly modest, work reasonably promptly. The risk of that happening in the early lost years might be quite small, but it would surely increase with age. The risk might be less if he had office work which valued experience: more if his work had a significant manual element. Much might depend upon the stability of the industry he found himself in. With such uncertainty so far ahead, a further discount of 20% to 6.36 seems fair and reasonable.

107. I therefore value the lost years claim at £42,402 (£6,667 x 6.36).

108. That concludes the findings which I have to make apart from the question of whether any part of the award should be by way of periodical payments. If the award is to be entirely in the form of a lump sum it will be £4,619,912, as follows:

Pain, suffering and loss of amenity, and interest	£210,000
Past loss, and interest	£360,000
Future loss of earnings	£260,000
Aids and equipment	£150,000
IT equipment	£175,000
Treatment and therapies	£65,000
Travel and transport	£100,000
Holiday costs	£40,000
Therapeutic leisure activities	£2,344
Court of Protection and receivership	£180,000
Miscellaneous	£40,000
Future Care and case management	£2,483,757
Accommodation	£511,409
Lost Years	£42,402
Total	£4,619,912

109. The questions of whether any part of the award should be by way of periodical payments and, if so, to what extent, were argued at trial so far as they could be, and I invited further submissions by email after the main part of this judgment was sent to the parties in draft. Further submissions still, and a provisional financial report for the claimant, were sent after Lloyd-Jones J. handed down his further judgment in *A v. B Hospitals NHS Trust* [2006] EWHC 2833 on 10 November 2006. However, the argument at trial was conducted without knowledge of the lump sum values of the award and its component parts, and no expert, financial evidence was called (the report which has now been sent to me was expressly subject to the amount of damages under various heads, and it was not served on the defendant until early in the trial). Leaving aside the extent to which I can take account of the judgment in *A* when I have not heard the evidence in that case, Lloyd-Jones J. was presented with arguments in relation to periodical payments linked to the Retail Price Index only, and it may not be possible to make a considered decision in this case without reference to other indices or combinations of indices.

110. Among other points, the defendant has argued that as the report of the claimant's expert was not served in good time before the trial, I should proceed to decide the issues relating to lump sum and periodical payments without expert evidence, on the basis of periodical payments linked to the RPI, but there were reasons for the late service of the report, which was in any event provisional. In the particular circumstances of this case where life expectancy is agreed but on a basis which was further agreed by the paediatric neurologists at trial, and where there is a large award for future care, but there have been substantial interim payments, mostly spent on the purchase of a new home, and where the possible availability of other indices than the RPI would warrant expert evidence should either party wish to adduce it, I propose to hand down this judgment in its present form and to proceed to hear any ancillary applications and to give directions relating to a further trial of the issue of lump sum or lump sum and periodical payments.

Appendix of Future Care Costs

1. Phase 1, aged 9.5 to 10.5.

Day Care		
Termtime		
Single weekday carer, 4.5 hours x 5 x £10	£225 per week	
Single weekend carer, 10 hours x 2 x £12	£240	
For 43.5 weeks p.a. x -£465		£20,228 p.a.
School holidays		
Single weekday carer, 10 hours x 5 x £10	£500	
Single weekend carer, 10 hours x 2 x £12	£240	
For 14.5 weeks p.a. x £740		£10,730
Waking night care		
Weekdays, 10 x 5 x £10		£500
Weekends, 10 x 2 x £12		£240
For 58 weeks p.a. x £740		£42,920
ERNIC		£5,091
Other expenditure (food £1300, recruitment £400, insurance £85, training £600, payroll £400)		£2,785
Total for the year		£81,754
Discounted at 2.5% p.a., to 0.98 x £80,506		£80,119

2. Phase 2, aged 10.5 to 12.5.

Day Care (as Phase 1), each year	£30,958
Sleep in Night Care	
For 58 weeks p.a. x £444	£25,752
Ernic and other expenditure (as Phase 1)	£7,876

Total for each year		£64,586
For 2 years discounted at 2.5% p.a. to 1.87 x £64,586		£120,776

3. Phase 3, aged 12.5 to 16.5.

Care for each year as Phase 2		£64,586
Second carer, 4 hours a day x 5 days x £10	£200	
4 hours a day x 2 days x £12	£96	
Total extra care per week 296 x 58		17,168
Plus additional ERNIC		£1,628
Plus additional £5 a week food and leisure		£260
Total for each year		£83,642
For 4 years discounted at 2.5% p.a. to 3.5 x £82,679		£292,747

4. Phase 4, aged 16.5 to 18.5.

Term time (save half-terms)		
Day care, Monday to Friday,		
4 hours x 2 carers x £10 = £80 per week x 43.5 weeks		£3,480
Holiday and half-term day care, Monday to Friday		
Carer 1, 10 x 5 x £10	£500	
Carer 2, 4 x 5 x £10	£200	
	£700 x 14.5 weeks	£10,150
Weekend care throughout the year		
Carer 1, 10 x 2 x £12		£240
Carer 2, 4 x 2 x £12		£96
	336 x 58	19,488
Sleep-in night care		
£60 x 1 + £72 x 2 = 204 x 43.5 when boarding		£8,874

60 x 5 + 72 x 2 = 444 x 14.5 holidays/half terms	£6,438	15,312
ERNIC at 12.8% on 67% of £48,430		£4,153
Other expenditure		£3,045
Total for each year		£55,628
For 2 years, discounted at 2.5% to 1.62 x £55,628		£90,117

Phase 5, age 18.5 to 20.5

22 hours a day x 5 x £10, Monday to Friday	£1,100
x 2 x £12, Saturday and Sunday	£528
Sleep-in carer, 5 x £60 and 2 x £72	£444
ERNIC at 12.8% of 67% of weekly total	£178
Total per annum, £2,250 x 14.5	£32,625
Food and leisure, £50 x 14.5	£725
Recruitment, insurance, training and payroll	£1,485
Total for each year	£34,835
For 2 years, discounted to 1.54 x £34,835	£53,646

6. Phase 6, age 20.5 to 41

Weekly total for day care and sleep-in care	
and ERNIC as in Phase 5, £2,250 x 58 weeks a year	£130,500
Food and leisure, £50 x 52	£2,600
Recruitment, insurance, training and payroll a year	£1,485
Total for each year	£134,585
For 20.5 years, discounted to 12.33 x £134,585	£1,659,433

7. Case Management

Age 9.5 to 20.5

80 hours plus 40 hours travelling at half time,

100 hours x £75, a year	£7,500
For 11 years discounted to 9.51 x £7,500 as a lump sum	£71,325

Age 20.5 to 41

100 hours plus 50 hours travelling at half time

125 hours x £75, a year	£9,375
For 20.5 years discounted to 12.33 x £9,375 as a lump sum	£115,594
Total lump sum	£186,919