Neutral Citation Number: [2017] EWHC 1245 (QB)

Case No: HQ13X03449

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/05/2017

Before :

MR JUSTICE WILLIAM DAVIS

- -

Between :

	JR **(A Protected Party by his Mother and Litigation Friend JR)**	**Claimant**
	- and -	
	SHEFFIELD TEACHING HOSPITALS NHS FOUNDATION TRUST	**Defendant**

- -
- -

Derek Sweeting QC and Richard Baker (instructed by **Switalskis**) for the **Claimant**
Margaret Bowron QC (instructed by **DAC Beachcroft**) for the **Defendant**

Hearing dates: 26th to 28th April, 2nd to 4th May 2017

- -

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.

.....

Mr Justice William Davis:

1. The Claimant is now aged 24. He was born on 14 November 1992. His birth was premature. He was delivered by vaginal breech delivery. Because of the traumatic nature of that delivery he suffered intracranial haemorrhage and brain injury. This has caused moderately severe spastic cerebral palsy and significant cognitive impairment. It

is accepted that his injury was caused by the negligence of the Defendant as the party responsible for the hospital in Sheffield at which he was delivered. It is not in dispute that, because the Claimant was a pre-term infant in breech presentation, the appropriate mode of delivery was caesarean section. Those who had the care of the Claimant's mother were in breach of duty in attempting a vaginal delivery.

2. The damages recoverable because of the Defendant's breach of duty in part remain in dispute. Equally, substantial parts of the claim have been agreed. Due to his cognitive deficit, the Claimant is a protected party. Thus, part of my task is to approve those sums which have been agreed. Given that context I have been invited to make an anonymity order for the reasons discussed in JX MX v Dartford and Gravesham NHS Trust [2015] EWCA Civ 96. I make such an order. Nothing shall be published which could identify the Claimant whether directly or indirectly and that non-parties shall not have access to any document in the court records. This judgment has been anonymised accordingly.

The Claimant's progress to date and continuing condition

3. JR has severe motor impairments. He has spasticity affecting the muscles of speech and swallowing. His speech is slurred but he can make himself understood. He has little difficulty with swallowing. Spasticity is very severe in the muscles of all four limbs. JR has no effective movement of his lower limbs. He has fixed flexion deformities at the hip and knees. There is significant impairment of motor function in the upper limbs. JR's hands have very limited function, the right hand being better than the left. The consequence of these neurological impairments is that he is wholly dependent on others for most aspects of daily living: all transfers; dressing; personal hygiene. He can feed himself but all his food and drink needs to be prepared for him. Because he has difficulty rolling or manoeuvring in bed, he needs regular night time assistance.

4. The brain injury led to significant cognitive impairment. Neuropsychological testing has established that JR has difficulties of varying severity in relation to his ability to understand, organise, process and act on information. His level of sustained attention and concentration is significantly reduced from the norm. He has some impairment of higher executive functioning. Overall his intellectual functioning is within the borderline range. These consequences flow from the brain injury suffered at birth.

5. Over the years JR has had several surgical interventions, the most recent being a femoral osteotomy of the right hip in 2007. In 2004 an intrathecal Baclofen pump was inserted with a view to controlling the spasticity and this requires regular attention.

6. JR will require continued and regular supervision from a wide range of medical disciplines. A neurological team with experience in the management of intrathecal Baclofen (such a pump not being in common use) will be required to monitor JR. The pump will have to be replaced periodically. This will involve an operation under general anaesthetic at each replacement. He will require supervision from a multi-disciplinary neurorehabilitation team with particular input from physiotherapists and occupational therapists. It is likely that JR's upper limb function will deteriorate as he grows older. This will not affect his care requirements to any significant degree given the high level of care he needs now. It may impact on the level of physiotherapy required to maintain JR's function to a reasonable extent.

7. Other than a deterioration in upper limb function JR is unlikely to suffer any other later complication. His future risk for development of epilepsy is greater than that for the population as a whole but not substantially so. If epilepsy were to develop, it would be controlled by appropriate drug therapy. JR's life expectancy has been reduced as a result of his severe motor impairment. The medical consensus is that he will have a life expectancy to the age of 70.

8. Notwithstanding the severe nature of JR's injuries he is described by all who have had dealings with him in the course of this litigation as a delightful young man with an outgoing personality and many interests. Despite his cognitive deficits he attended a further education college after he left school and undertook a course in digital media. He did not complete the course but only because at the time he had no funding to meet the cost of support workers he required. He retains an interest in IT and photography. His physical limitations do not prevent him from participating in powered wheelchair football matches on a regular basis. I have seen video footage of one such match. It is apparent that JR is a wheelchair footballer of high quality.

9. For someone with the physical and other difficulties he faces JR leads an extraordinarily active life. He will continue to do so. Indeed, it might be expected that he will seek to widen his interests. He is not someone who regards his difficulties as a barrier to activity. Rather, he sees them as something to be overcome so he can follow his interests.

<u>The issues to be resolved</u>

10. There has been a considerable measure of agreement between the parties to which I shall return in detail when considering the question of approval. Subject to approval general damages for pain, suffering and loss of amenity are agreed in the sum of £300,000. The entirety of the claim for past financial loss is agreed subject to approval. What are said to be appropriate sums for the future cost of occupational therapy, speech and language therapy, orthotics and podiatry are also agreed together with a substantial sum for miscellaneous expenses.

11. However, significant areas of dispute remain in respect of future loss which I must resolve. In headline form these are as follows:

- Loss of earnings and pension.
- Costs of care.
- Aids and equipment.
- Physiotherapy.
- Accommodation.
- Assistive technology.
- Travel and transport.
- Court of Protection.

In respect of most of these areas of dispute, the question is whether a particular piece of expenditure is necessary or reasonable. In relation to two matters – loss of future earnings and accommodation – there is an issue as to the proper legal principles to be applied. I shall deal with those two matters first.

12. The general principles to be applied in a case of this kind are not in issue. The award of damages should so far as is possible put JR in the position he would have been in had he not been injured at birth due to the Defendant's breach of duty. He is "entitled to be compensated as nearly as possible in full for all pecuniary losses…": Wells v Wells [1999] AC 345 at 382. In deciding whether a head of loss is recoverable in the amount claimed or at all, there must be an assessment of the reasonableness of the head of loss and of its amount: Sowden v Lodge [2004] EWCA Civ 1370. The principles are encapsulated in Heil v Rankin [2001] 2 QB 272 at 293/294 as cited in Whiten v St George's Healthcare Trust [2011] EWHC 2066 (QB):

> "….. the aim of an award of damages for personal injuries is to provide compensation. The principle is that 'full compensation' should be provided. … This principle of 'full compensation' applies to pecuniary and non-pecuniary damages alike. … The compensation must remain fair, reasonable and just. Fair compensation for the injured person. The level must also not result in injustice to the defendant, and it must not be out of accord with what society as a whole would perceive as being reasonable".
>
> In Whiten Swift J said that determining what was reasonable involved consideration of all relevant circumstances, including the requirement for proportionality as between the cost to the defendant of any individual item and the extent of the benefit which would be derived from that item by the claimant. I agree with that proposition. It is to be applied in the way set out in the judgment of Warby J in A v University Hospitals of Morecambe Bay NHS Foundation Trust [2015] EWHC 366 (QB) at paragraphs 9 to 15.

Loss of earnings and pension

13. JR has no prospect at any time of engaging in remunerative employment. This is apparent from all the evidence, in particular the joint statement from Dr Kent and Professor Chadwick who provide the neurological opinion in the case. Thus, it is not in dispute that he is entitled to recover a sum to represent his loss of earnings and pension for life. There are two live issues. First, what is the appropriate annual figure for loss of earnings and for loss of pension for the single year for which any pension would be payable prior to JR's expected date of death? Resolution of this issue is fact specific i.e. the outcome will depend on what inferences properly can be drawn from the available evidence. Second, can JR recover for the loss of pension during the "lost years"? Had he not been injured at birth, he would have had a normal life expectancy for a male of his age. If a "lost years" claim is sustainable, it is agreed that the multiplier to be applied to any annual figure is 26.64. What is very much in dispute is whether a "lost years" claim can be made at all. The Defendant argues that the Court of Appeal in Croke v Wiseman [1982] 1 W.L.R. 71 decided that someone in the position of JR cannot recover for "lost years". On behalf of JR it is argued that the decision in Croke does not apply to someone in his position. It will be necessary for me to analyse Croke v Wiseman in

conjunction with other relevant authority.

14. As to the first issue it is impossible to base an assessment of what JR would have earned uninjured over his lifetime on evidence relating to his pre-accident earning capacity. His current physical and mental condition has been more or less constant since his birth. That is not to say that there is no evidence as to the kind of young man he is. His current case manager describes him as "very motivated and enthusiastic". His determination to do as much as he can is demonstrated by his sporting and other activity. His willingness to apply himself to a course of study is evidenced by the fact that he commenced an IT course at Hillsborough College which he would have completed had he had sufficient care support. These aspects of his personality would have existed had he not been injured at birth and they would have enhanced his employment prospects.

15. It is impossible to reach any informed view as to what his likely level of educational or vocational achievement would have been in terms of his uninjured intellectual capacity. He has an older sibling who is now 26. In many cases comparison with the sibling would be a very useful exercise. In this instance the sibling also suffers from some cognitive deficit (albeit mild) due to his very premature birth. The consequence is that there is no sibling unaffected by any health issues whose earnings can be used as a benchmark. However, JR's brother is in work. According to JR's mother he works as a welder with earnings of approximately £35,000 per annum. No evidence was given as to whether this figure was gross or net. On behalf of the defendant a metaphorical eyebrow is raised at this evidence. During the hearing no evidence in the form of wage slips or the like was produced though it now appears that they were documents disclosed in the case, post hearings submissions having clarified the point. Whatever the position in relation to JR's brother his stated earnings compare very favourably with those of JR's father whose evidence is that he earns about £20,000 per annum as a forklift truck driver.

16. I was invited by the Defendant to conclude that the evidence about the sibling's earnings is of limited assistance and to find that, in accordance with agreed evidence from psychology experts, JR would have gone into a skilled trade in the steel industry. On that basis it is said that the median gross annual pay for a skilled tradesman should be used as the basis for the calculation of loss of earnings. In 2016 this figure was £26,751. This produces a net figure of £21,358 per annum.

17. On behalf of JR it is argued that the evidence in relation to the earnings of JR's sibling was not challenged and that those earnings are a useful comparator. Further, it is said that I should take into account the achievements of two of JR's cousins. One obtained a 2:1 degree in biology from Sheffield University and now works as a senior accounts manager for a firm in London though I have no evidence about the earnings of this person. The other currently is at Birmingham University as an undergraduate studying for a degree in criminology. If JR had emulated his cousins I am invited to infer that he could reasonably have expected to earn more than the average skilled tradesman's wage albeit that I have no direct evidence about what his cousins earn or might earn in the future.

18. I find that JR would have achieved working lifetime average earnings in excess of the current median figure for a skilled tradesman. Although the evidence in relation to his sibling is of limited assistance I do not ignore it entirely. I also take some account of the

progress of his cousins. But the factor which influences me the most is the innate personality which JR undoubtedly has and which, had he remained uninjured, would have resulted in him over-achieving rather than under-achieving. It is impossible to calculate a precise figure for net annual earnings taking into account all relevant deductions including any occupational pension contributions. The Defendant is correct in pointing out that, if a claim for a workplace pension is to be sustainable, the scheme is likely to be contributory with some deduction being appropriate. On behalf of JR it is argued that a net annual figure of £23,567.20 (based on a gross figure of £30,000) is reasonable. It is not clear whether this takes account of any pension contribution or (since it is said that JR would have undertaken a degree course) repayment of a student loan. I conclude that the appropriate multiplicand for future loss of earnings is £23,000. It may be (as suggested in the closing submission made on behalf of JR) that this underestimates his earning potential. It certainly does not over-estimate it.

19. JR's case is that in today's money the figure recoverable for the occupational pension will be £5,000 per annum. Complaint is made that this figure is unexplained and the Defendant asserts that it is unlikely to be at this level. Assuming a fund accumulated over a working life of 45 years with gross annual earnings of around £30,000 I do not consider that the figure put forward on JR's behalf is unrealistic. It takes account of the modest tax liability which will follow. Thus, the multiplicand for loss of pension will be £12,675.

20. I move on to consider the second issue under this head, namely whether JR can recover the loss of pension for the "lost years". As indicated above this requires analysis of relevant authorities.

21. In Pickett v British Rail Engineering [1980] A.C. 136 the House of Lords had to consider the claim by the administratrix of the estate of a man who had died due to exposure to asbestos. Mr Pickett had commenced his claim before his death. By the time of any appeal he had died leaving a widow and the claim was prosecuted on behalf of his estate. At his death Mr Pickett was 53. At first instance and in the Court of Appeal he recovered loss of earnings for the period up to his death but not beyond that. The Court of Appeal was bound by the decision in Oliver v Ashman [1962] 2 Q.B. 210 which decided that no loss of earnings arose once the injured party had died. The House of Lords overruled Oliver v Ashman. There were five speeches in the House of Lords. The following extracts represent the essence of the decision.

"To the argument that " they are of no value because you will not be there to enjoy them " can he not reply, " yes they are: what is of value to me is not only my opportunity to spend them enjoyably, but to use such part of them as I do not need for my dependants, or for other persons or causes which I wish to support. If I cannot do this, I have been deprived of something on which a value—a present value—can be " placed"?.....

.....Future earnings are of value to him in order that he may satisfy legitimate desires, but these may not correspond with the allocation which the law makes of money recovered by dependants on account of his loss. He may wish to benefit some dependants more than, or to the exclusion of, others—this (subject to family inheritance legislation) he is entitled to do. He may not have dependants, but he may have others, or causes, whom he

would wish to benefit, for whom he might even regard himself as working. One cannot make a distinction, for the purposes of assessing damages, between men in different family situations…….

....My Lords, 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 (c.f. Benham v.Gambling) neither present nor future earnings could enter into the matter: in the more difficult case of adolescents just embarking upon the process of earning (c.f. Skelton v. Collins, infra) the value of " lost" earnings might be real but would probably be assessable as small.

Lord Wilberforce at 149E and 150A-E.

"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 a 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 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. I recognise that there is a comparatively small minority of cases in which a man whose life, and therefore his capacity to earn, is cut short, dies intestate with no dependants or has made a will excluding dependants, leaving all his money to others or to charity. Subject to the family inheritance legislation, a man may do what he likes with his own. Certainly, the law can make no distinction between the plaintiff who looks after dependants and the plaintiff who does not, in assessing the damages recoverable to compensate the plaintiff for the money he would have earned during the " lost years" but for the defendant's negligence. On his death those damages will pass to whomsoever benefits under his will or upon an intestacy.

I think that in assessing those damages, there should be deducted the plaintiff's own living expenses which he would have expended during the

" lost years " because these clearly can never constitute any part of his estate. The assessment of these living expenses may, no doubt, sometimes present difficulties, but certainly no difficulties which would be insuperable for the courts to resolve—as they always have done in assessing dependancy under the Fatal Accidents Acts."

Lord Salmon at 153F to 154D.

"For our present consideration relates 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. With respect, it appears to me simply not right to say that, when a man's working life and his natural life are each shortened by the wrongful act of another, he must be regarded as having lost nothing by the deprivation of the prospect of future earnings for some period extending beyond the anticipated date of his premature death."

Lord Edmund-Davies at 162C-E.

22. In the light of Pickett there can be no doubt that an adult wage earner whose life expectancy is shortened by the negligence of another to such an extent that he will lose some years of working life will recover the loss of earnings attributable to those "lost years". The sum recoverable will take account of the living expenses to which the wage earner would have been subject because they could not be part of his estate. I can see no reason in principle why the loss of a pension should not be recoverable on the basis of Pickett. The Defendant does not argue that the loss of a pension is to be treated differently to loss of earnings. I am fortified to a moderate degree in my conclusion by the approval of an agreed figure by Lloyd-Jones J (as he then was) in A v Powys Local Health Board [2007] EWHC 2996 HC for loss of pension in the "lost years" claim. Had Lloyd-Jones J considered that there was an objection in principle to such a loss being recoverable, I have no doubt that he would have said so. I moderate my reliance on that approval because the case concerned a 16 year old Claimant with very similar injuries to those suffered by JR. Lloyd-Jones J approved a "lost years" figure without any reference to Croke v Wiseman (supra) to which I now turn.

23. When James Croke was 21 months he went into hospital with a feverish illness. He was treated negligently. He suffered a cardiac arrest. Although his life was saved, he sustained catastrophic brain damage. He was left with no brain function, he was paralysed in all four limbs and he was blind. All he could do was to lie on the floor or in his mother's lap. His life expectancy was to the age of 40.

24. The hospital authority admitted liability. Amongst the heads of damage was loss of earnings. The trial judge assessed that loss by reference to the period up to the likely date of death. No award was made in respect of the "lost years". The health authority appealed against the judge's award in more than one respect, one being the loss of earnings award. Lord Denning MR took the view that no award at all should be made for loss of earnings in a case where a very young child had suffered the kind of injury to which James Croke was subject. That was not the majority view. This was set out by Griffiths LJ (as he then was) who considered briefly the issue of "lost years" as

discussed in Pickett and then went on at 82C-83C:

"I do not read those passages in the speeches of their Lordships in Pickett's case and Gammell v. Wilson [1981] 2 W.L.R. 248 in which they stress the difficulty of assessing an award of damages for the lost years in the case of a child as having general application to the claims of all children whose earning capacity has been diminished. In attempting to assess the value of a claim for the lost years, the court is faced with a peculiar difficulty. Not only does it have to assess what sum the plaintiff might have been earning, but it also has to make an assessment of the sum that would not have been spent upon the plaintiff's own living expenses and would have, therefore, been available to spend upon his dependants. In the case of a living plaintiff of mature years whose life expectation has been shortened and who has dependants, there are compelling social reasons for awarding a sum of money that he knows will be available for the support of his dependants after his death. It was this consideration that led to the result in Pickett's case. As a consequence of the decision in Pickett's case, the House of Lords in Gammell's case felt compelled to apply the same principle to a claim brought on behalf of the estate of the deceased person. If it could be shown that part of the deceased's income was available to be spent on his dependants, then a claim for that part of the income was available to cover the lost years of working life. 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 that child that will be dependent. 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 of money for persons who will in fact never exist. It was this consideration that led me in Kandalla v. British European Airways Corporation [1981] Q.B. 158 to refuse to assess a sum for the lost years in respect of two unmarried doctors by speculating as to whether or not in the future they would have married and set aside some part of their income for husbands or children. I refused to enter into the realm of speculation about an impossible and hypothetical situation.

However, when one is considering the case of a gravely injured child who is going to live for many years into adult life, very different considerations apply. There are compelling social reasons why a sum of money should be awarded for his future loss of earnings. The money will be required to care for him. Take the present case; the cost of future nursing care has been assessed upon the basis of nurses coming in to care for him for part of the day and night. 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 provide for such extra comforts as he can appreciate. It cannot be assumed that his parents will remain able to house, feed and care for him throughout the rest of his life. If, of course, damages have been awarded upon the basis of the full cost of residential care so that they include the cost of roof and board, any award for future loss of earnings will be small because there will be a very large overlap between the two heads of damage. The plaintiff must not be awarded his future living expenses twice over; this would be unfair to the defendants.

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."

25. On behalf of the Defendant it is argued that Croke bars any claim for "lost years" by JR. Although he is not a child, the rationale in Croke applies equally to him. JR was

catastrophically injured at birth. He will never have any dependants. The court should refuse to speculate, speculation being the only route by which I could find that JR could have any dependants in the future.

26. Croke has been subject to significant judicial criticism over the years. In Whipps Cross University NHS Trust v Iqbal [2007] EWCA Civ 1190 the trial judge made an award in respect of "lost years" in the case of a 9 year old claimant with a life expectancy to age 41. The claimant had suffered injuries not dissimilar to but rather worse than those suffered by JR. The defendant health authority appealed against the "lost years" award. The rival submissions were summarised by the Court of Appeal as follows:

The defendant's submissions can be summarised as follows. First, it is submitted that a claim for the lost years by a young claimant with no earnings record and no dependants is too remote to be capable of being compensated by an award of damages. Secondly, such a claim is not justified by the decision of the House of Lords in Pickett . Thirdly, in any event, the trial judge, and it is submitted this court, are bound by the decision of this court in Croke v Wiseman 1982 1WLR 71 which it is contended held impermissible a claim for lost years in respect of a young child.

The claimant's submissions are as follows. First, since Pickett claims for lost years are permissible. Secondly, such claims are not restricted to adult claimants with or without dependants. Thirdly, the principle of 100% recovery of damages for a victim of a tort enables a child to recover compensation for loss of earnings in the lost years. Fourthly, neither the judge nor this court is bound by Croke v Wiseman .

27. In the leading judgment in Iqbal Gage LJ concluded that Croke (a decision of the Court of Appeal) was not consistent with the earlier decisions of the House of Lords in Pickett and Gammell. He discussed the passages in Pickett to which I have already referred and concluded in these terms:

"….the effect of Pickett is to hold that claims for loss of earnings in the lost years are permissible and that such claims are not restricted to adult wage earners with dependants. A claim by the estate of an adult or adolescent wage earner without dependants can clearly be made. I also have no doubt that Pickett does not as a matter of principle rule out claims made by the estate of deceased young children. The decision does however point to the difficulties of proof and assessment of such claims but those difficulties do not alter the underlying principle. These conclusions are in my judgment reinforced by the observations of Lord Scarman in Gammell v Wilson 1982 AC 27.

28. He then referred to Gammell which illustrates the fact that young unmarried males who have yet to commence a working life killed in road accidents may have a "lost years" claim under the Fatal Accidents Acts and cited the observations from the speech of Lord Scarman:

> "The correct approach in law to the assessment of damages in these cases presents, my Lords, no difficulty though the assessment itself often will …. The loss is pecuniary. As such, it must be shown, on the facts found, to be at least capable of being estimated. If sufficient facts are established to enable the court to avoid the fancies of speculation even though not enabling it to reach mathematical certainty, the court must make the best

> estimate it can. In civil litigation it is the balance of probabilities which matters. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award — not even a "conventional" award — should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime at the age of five, might have a claim: it would depend on the evidence. A teenage boy or girl, however, as in Gammell's case may well be able to show either actual employment or real prospects, in either of which situations there will be an assessable claim. In the case of a young man already in employment (as was young Mr. Furness), one would expect to find evidence upon which a fair estimate of loss can be made. A man well established in life, like Mr Pickett, will have no difficulty. But in all cases it is a matter of evidence and a reasonable estimate based upon it …. My Lords, the principle has been settled by the speeches in this House in Pickett's case. The loss to the estate is what the deceased would have been likely to have available to save, spend, or distribute after meeting the cost of his living at a standard which his job and career prospects at time of death would suggest he was reasonably likely to achieve. Subtle mathematical calculations based as they must be on events or contingencies of a life which he will not live, are out of place: the judge must make the best estimate based on the known facts and his prospects at the time of death."

29. Gage LJ considered and rejected the submission that Pickett and Gammell excluded children from any "lost years" award in these terms, Mr Spencer being a reference to counsel for the health authority.

"Mr Spencer accepts, as he must, that Gammell demonstrates that in the case of adolescents and young men there is no reason in principle why damages for the lost years cannot be awarded. He accepts that in each of the two cases considered by the House of Lords there was no evidence of any prospective dependants. However, he submits that in each case with which the House of Lords was concerned the deceased men were sufficiently launched on their earning careers for the court to make some assessment of the pecuniary loss. He contrasts this with the case of a young child so grievously injured that there can never be any dependants.

In my judgment, Gammell makes quite clear, what might be said to be less clear from Pickett , that the age of a victim is not as a matter of principle relevant to the issue of whether or not a claim can be made for the lost years. Further, the lack of dependants cannot be a factor which defeats a claim for damages for loss of earnings in the lost years. When it comes to the assessment of damages for the lost years the issues are evidential and not matters of principle. In my view Gammell assists, by way of further explanation, the speeches of the House on this topic in Pickett."

30. Gage LJ went on to consider the judgment of Griffiths LJ in Croke with particular reference to the passage cited above.

"In my judgment, on any fair reading of the whole of the passage which I have cited above, Griffiths LJ was holding that claims for the lost years by a young child are not permissible. It seems to me that this is a statement of principle. The reason given for doing so is that the injuries are so catastrophic that there can never be any dependants. In my view, it is clear that Griffiths LJ regarded the absence of the prospective existence of dependants in the case of a young child as fatal to a claim for damages for loss of earnings in the lost years. Accordingly, it seems to me that this must be interpreted as a holding of principle and not a matter of evidence to be considered when assessing such damages.

Having reached the above conclusion, and after paying all due deference to the decision of such a distinguished constitution of this court, in my opinion the decision in Croke v Wiseman is not consistent with the decisions of the House of Lords in Pickett and Gammell . I would add that I find it difficult to accept that if it is possible to assess prospective future loss of earnings for the lifetime of a young child, even allowing for the difficulty of assessing the surplus, it is not possible to assess damages for the lost years."

Notwithstanding the very clear conclusion reached in relation to the inconsistency between Pickett and Gammell and the judgment of the Court of Appeal in Croke Gage LJ and the other members of the court in Iqbal decided that the statement of principle in Croke was binding on the Court of Appeal. Gage LJ put thus:

> "I am quite satisfied that in this case the court ought not to depart from the normal rule. Croke v Wiseman was decided after the court had been referred to both Pickett and Gammell . It is obvious from the judgments that the members of the court had heard full argument on those decisions. Although I have concluded that the decision is inconsistent with both Pickett and Gammell , I am not prepared to hold that the circumstances in this case are so rare and exceptional that this court is entitled not to follow it. Nor, even if permitted to do so, would I hold that the decision in Croke v Wiseman was manifestly wrong. I accept that this claimant may be reluctant to invest in the cost of an appeal to the House of Lords but in my judgment that is not a sufficiently strong reason to depart from the normal rule. In my view, the error, if error it be, must be corrected by the House of Lords".

Self-evidently the principle in Croke is binding on me.

31. Recent criticism of Croke is to be found in the judgment of Mrs Justice Elisabeth Laing in Totham v King's College Hospital NHS Foundation Trust at paragraphs 42 to 47. The judge in that case was concerned with a girl aged 7 who had suffered very serious injury at birth. The judge pointed out that Croke is inconsistent with the principle of full compensation (as per paragraph 12 above) and the so-called policy justification in Croke was inconsistent with Pickett and Gammell. Nonetheless, she recognised that she was bound by Croke given the age of the claimant with whom she was dealing.

32. On behalf of JR it is acknowledged that I cannot depart from Croke insofar as the principles in that case apply to JR. What is said on his behalf is that he is not a child and that the injuries affecting him, whilst very severe, are not catastrophic in the same sense

as those affecting James Croke. Therefore, his case falls to be considered within the principles set out in Pickett and Gammell. It is argued that there is no requirement to demonstrate the existence or prospect of dependants. Even if it were necessary to do so, JR's sociability and personality means that a dependency on him may well arise as he grows older and meets other people.

33. I agree that the policy considerations which led to the decision in Croke do not apply to JR. He is not a catastrophically injured child. He is a 24 year old man who can engage with others. Speculation is not required in order to identify a potential "lost years" claim. Rather, whether such a claim is sustainable can be assessed by reference to the available evidence. On behalf of the Defendant it is said that this claim could have been litigated when JR was 7 (James Croke's age at the date of trial) or 9 (the age of the claimant in Iqbal) in which event the claim for the "lost years" inevitably would have failed. It is argued that the mere fact that JR has reached adulthood should not change the position. In my view this fact undoubtedly does change the position. The claim for "lost years" falls to be considered as per Pickett and Gammell. The Defendant suggests that to allow this "for the sole arbitrary reason that the Claimant is an adult…lacks any sort of rigour and cannot be correct". JR's adulthood is not arbitrary. It is a fact which cannot be ignored. Because he has reached adulthood, there is no reason not to apply the well-established principles in Pickett and Gammell. Not to do so would lack rigour.

34. I do not know why JR's claim was commenced when it was i.e. some 20 or more years after the event. However, that is when it was commenced and proceedings were brought within time i.e. within 3 years of JR's majority. If it were to be said that permitting a "lost years" claim in the circumstances of this case provided an incentive to delay the issue of proceedings in cases involving very seriously injured babies and children, the proposition would have no merit. For over 20 years JR's parents struggled to look after him in inadequate accommodation without any real assistance. Their efforts are hugely to be commended. However, I have no doubt that they would have preferred the kind of assistance which now is forthcoming as a result of these proceedings and the Defendant's admission of liability. The same must apply to any parents in their position. No-one in their position would delay issuing proceedings to allow their child to reach adulthood to permit a "lost years" claim of relatively modest proportions.

35. The Defendant relies on the evidence of Dr Kent, the neurologist instructed on behalf of JR. In her report dated December 2015 she made this observation:

> "I think he is unlikely to have a permanent relationship or to get married. I would envisage him having close relationships with friends although I would like to think that with the right support he could have an active social life and the opportunity to mix with other people outside the immediate family particularly once he leaves school. It is important that his carers offer him appropriate support and companionship and clearly he is very sociable in school and college environment."

Particular emphasis is placed on the first sentence in that passage. I am urged to conclude that this evidence must lead to a finding on the balance of probabilities that JR will not have dependants. In that event no "lost years" claim can arise irrespective of the effect of Croke.

36. I do not ignore the evidence of Dr Kent. She has clear expertise in relation to what might be expected of those in JR's position. However, her evidence is hardly determinative. On the issue of what relationships JR may develop in the future her expertise is of limited value. On that issue it is necessary for me to look at the individual and to consider all the available evidence about him. Dr Kent based her observation on an examination of JR some 18 months ago. As JR's mother made clear in her evidence, since then his condition has improved greatly in a variety of respects: posture; movement; ability to feed himself; speech; use of assistive technology. JR already engages in social activity where he interacts with others in a similar position to himself e.g. wheelchair football. Now that he has the funds to provide the necessary support, he intends to resume college studies where he will interact socially with others at the college. It is accepted on all sides that JR is an entertaining young man with good social skills. In all those circumstances, I see every reason to conclude that there is a good prospect that JR will enter into a long term relationship of some kind giving rise to a dependency.

37. Even if I am wrong about that, Pickett makes it quite clear that it is not necessary to show that a claimant has or will have dependants to establish a "lost years" claim: see the speeches of Lord Wilberforce, Lord Salmon and Lord Edmund-Davies as cited above. Since Pickett applies to JR, the supposed lack of dependants does not prevent a "lost years" claim arising.

38. It is accepted on behalf of JR that a deduction must be made for living expenses which otherwise would have been incurred had he survived. The proposed reduction is one third so as to give a multiplicand of £8,365.50. In my judgment this reduction is insufficient. The pension figure is modest. The proper amount for living expenses must be a greater proportion of that modest figure than it would have been had the "lost years" involved loss of significant earnings. The Defendant argues that one half of the pension sum is the appropriate multiplicand. I agree. Thus, the multiplicand for the "lost years" will be £6,337.50.

39. No issue arises for my determination in relation to the appropriate multiplier whether in relation to loss of earnings/pension to date of death or in respect of the "lost years".

Accommodation

40. It is not in dispute that JR's current accommodation – a three bedroomed bungalow which he occupies along with his parents and his elder sibling – is wholly unsuited to his needs. It is agreed that a new property must be purchased and that adaptations to that property will be required. There are issues in relation to cost to which I shall return. Some of the accommodation costs issues will be affected by my findings in relation to care requirements and the nature and extent of therapy required by JR so I shall postpone any consideration of the detail of the accommodation claim until I have made those findings.

41. What I must deal with at this stage is the effect of the recent change in the discount rate

on the long-established Roberts v Johnstone approach to recovery of the cost of alternative accommodation. I begin with the case of George v Pinnock [1973] 1 W.L.R. 118 in which consideration was first given at an appellate level to the question of accommodation costs. In that case the claimant had sustained very significant neurological injuries. She was confined to a wheelchair and required substantial care for everyday living. By the time of the trial she had moved to a bungalow which was suitable for her needs. The capital cost of the bungalow was £12,000, a sum which had been met by the defendant's insurers on account of the award of damages which would follow in due course. The trial judge made no separate award for accommodation and made no reference to it in his judgment. The Court of Appeal with the agreement of the parties agreed to deal with the issue rather than to remit the case for a further hearing. Orr LJ dealt with the matter as follows:

"For the plaintiff it has been contended, in the first place, that she should receive as additional damages either the whole or some part of the capital cost of acquiring the bungalow, since it was acquired to meet the particular needs arising from the accident. But this argument, in my judgment, has no foundation. The plaintiff still has the capital in question in the form of the bungalow.

An alternative argument advanced was, however, that as a result of the particular needs arising from her injuries, the plaintiff has been involved in greater annual expenses of accommodation than she would have incurred if the accident had not happened. In my judgment, this argument is well founded, and I do not think it makes any difference for this purpose whether the matter is considered in terms of a loss of income from the capital expended on the bungalow or in terms of annual mortgage interest which would have been payable if capital to buy the bungalow had not been available. The plaintiff is, in my judgment, entitled to be compensated to the extent that this loss of income or notional outlay by way of mortgage interest exceeds what the cost of her accommodation would have been but for the accident. She would also, in my judgment, have been entitled to claim the expenses of a move to a new home imposed by her condition and the expense of any new items of furniture required because of that condition, but there was no evidence before the judge under either of those headings. As to the increased cost of accommodation, if any, it was, as I have said, agreed that we should make the best estimate we could on the available material, and the matter can only be approached on a broad basis."

Orr LJ assessed the damages recoverable in the sum of £3,000. This was in addition to care costs and loss of earnings. The assessment took into account the loss of investment income arising from the purchase of the bungalow, expenses which would have been incurred irrespective of the accident and tax liability. Other than identifying what needed to be taken into account, the judgment of Orr LJ provided no arithmetical basis for the eventual award.

42. In Roberts v Johnstone [1989] Q.B. 878 the Court of Appeal reviewed the application of George v Pinnock where the trial judge did not attempt to evaluate the annual cost whether by way of lost income or mortgage payments. The court expressly approved the proposition that damages for accommodation costs should not represent the full capital value of the asset since that would remain intact at the claimant's death and thereby represent a windfall to the claimant's estate. Consideration was given to using the annual mortgage interest to reach the appropriate figure. However, given the mortgage interest rate at that time (just over 9% taking into account tax relief) this would have led to recovery of a sum in excess of the capital value of the house. Therefore, the court in Roberts v Johnstone turned to consider the lost income by reference to return in risk-free

investment. Giving the judgment of the court Stocker LJ at 892G-893B said:

> "It seems to us, however, that where the capital asset in respect of which the cost is incurred consists of house property, inflation and risk element are secured by the rising value of such property particularly in desirable residential areas, and thus the rate of 2 per cent. would appear to be more appropriate than that of 7 per cent. or 9.1 per cent., which represents the actual cost of a mortgage loan for such a property.
>
> We are reinforced in this view by the fact that in reality in this case the purchase was financed by a capital sum paid on account on behalf of the defendants by way of interim payments, and thus it may be appropriate to consider the annual cost in terms of lost income and investment, since the sum expended on the house would not be available to produce income. A tax-free yield of 2 per cent. in risk-free investment would not be a wholly unacceptable one. Mr. McGregor, for the plaintiff, objects that if a rate of 2 per cent. is adopted then the multiplier of 16 would be far too low and a substantially higher multiplier should be adopted, resulting in much the same anomaly. For our part we would reject this argument, since the object of the calculation is to avoid leaving in the hands of the plaintiff's estate a capital asset not eroded by the passage of time; damages in such cases are notionally intended to be such as will exhaust the fund contemporaneously with the termination of the plaintiff's life expectancy."

43. This approach has been adopted since 1989. The 2% figure identified by Stocker LJ subsequently increased to 2.5% but otherwise many hundreds if not thousands of cases of this kind have been valued using the loss of income formula. It has come under attack as leading to injustice in some cases. The difficulties involved were described by Tomlinson LJ in Manna v Central Manchester University Hospitals NHS Foundation Trust [2017] EWCA Civ 12. The facts in Manna are no relevance to the issue under consideration. Rather, it is the generality of the discussion which is useful. Tomlinson LJ said this:

> "Damages in cases of this sort are notionally intended to provide a fund which will both meet the claimant's life-time needs and be exhausted contemporaneously with the termination of the claimant's life expectancy. Roberts v Johnstone prescribes that the claimant should, in respect of the cost of accommodation, be compensated for the notional loss of investment income on the capital cost incurred in buying a suitable property. The resulting sum awarded will be wholly insufficient to purchase a property, but the theory is that the shortfall and thus the balance of the actual funds required in order to purchase a suitable property can be found in, or borrowed from, the awards made under other heads of damage such as pain, suffering and loss of amenity, loss of earnings, capitalised awards for therapy and other costs. See

generally per Swift J in Whiten v St George's Healthcare NHS Trust [2011] EWHC 2066 QB at paragraph 411. In order to reflect the notional loss of investment income a tax free yield on risk-free investment was assessed at 2% in Roberts v Johnstone, although the rate now conventionally applied in the calculation is 2.5%. The theory here is that where the capital asset in respect of which the cost is incurred consists of residential property, the inflation and risk element are secured by the rising value of such property, particularly in desirable residential areas. When the calculation is concerned with the principal home it is conventional and consistent with the underlying theory to apply the lifetime multiplier appropriate to the claimant's life expectancy.

The exercise in which the court is thus engaged is in modern conditions increasingly artificial. The assumption underlying the approach is that the claimant will be able to fund the capital acquisition out of the sums awarded under rubrics other than accommodation. But in modern times residential property prices have increased rapidly while general awards for pain, suffering and loss of amenity have remained at their traditional levels. Whilst Peter is no doubt robbed to pay Paul, it must often be the case that the accommodation assessed by the court as suitable is simply not purchased. A further problem confronts the claimant with immediate and pressing needs but a relatively short life expectancy. The adoption of the appropriate multiplier in his case, when allied to the 2.5% notional return upon investment, will lead to a relatively modest award and a large shortfall between it and the cost of acquiring the property which is acknowledged to be required to meet the claimant's needs during his admittedly short life expectancy. A similar problem confronts the claimant who establishes less than 100% liability in the defendant, as here, where the award is only for 50% of the sums regarded as necessary to meet the Claimant's reasonable needs……..

Whilst the Roberts v Johnstone approach is designed to avoid conferring a windfall upon a claimant's estate, it gives rise to other anomalies. Thus in many instances of adapted accommodation in cases of this sort there is potentially a windfall for the claimant in the event of the death of his parent carers, since he is likely to be left with a home which is larger than necessary for his own requirements……one could mitigate those effects by adopting a different multiplier for that part of the cost which represents the provision of family accommodation over and above that required for the disabled claimant, but there has been little enthusiasm for such a solution."

Tomlinson LJ went on to describe the Roberts v Johnstone approach as "imperfect but pragmatic". The figure of 2.5% referred to in Manna was in line with the discount rate set in 2001 by the Lord Chancellor pursuant to the Damages Act 1996 as representing what was then a three year average of real yields on Index Linked Gilts. That figure was taken as the benchmark of risk-free investment. The approach disadvantaged some claimants

particularly in cases of a short life expectancy. Often, the claimant with the short life expectancy would be the claimant with the greatest need for special accommodation. Yet for such a claimant 2.5% of the capital cost taken with a lifetime multiplier would come nowhere near the actual cost of the accommodation. Moreover, given a short life expectancy the capitalised value of the loss of earnings would not provide a fund to make up the difference.

44. In February of this year the Lord Chancellor exercised her power to revise the personal injury discount rate. In a statement dated 27 February 2017 she concluded that the rate should be based on the same formula as applied in 2001. She stated that the consequence of using this formula in the current environment was that the discount rate was to be -0.75%. Her statement did not provide her detailed reasons for setting the rate at this level. It has had the result of increasing dramatically the multipliers in cases such as the present. For instance, in relation to JR the multiplier for loss of earnings now is effectively double that which it would have been 12 months ago.

45. The Defendant argues that the conclusion which must be taken from the Lord Chancellor's statement is that there is at present no ability to obtain any positive return on a capital fund based on risk-free investment. This means that there is no need to compensate JR for the loss of that return. In the past the notion was that the sum expended on a house otherwise would have earned an income. This was the basis of the Roberts v Johnstone formula. That basis now has no foundation. The one type of investment which will continue to yield a return in the long term is real property. The Defendant's argument is that the cost of the accommodation can be borrowed (to use the language of Manna and Whiten) from the capitalised loss of earnings figure. Though I shall deal with the precise cost hereafter, the cost of suitable accommodation for JR will between £700,00 and £1 million. I shall assume for these purposes that the cost will be £900,000. The so-called loan in that sum notionally will be repaid to JR's estate at his death. Indeed, it is likely that the property will have appreciated in value. On the figures in this case JR will still be able to purchase a suitable house or bungalow. His capitalised loss of earnings figure alone will be in excess of £1 million. Put another way the Defendant argues that the negative yield on Interest Linked Gilts means that the Roberts v Johnstone formula results in a negative sum for accommodation costs. Whilst the Defendant does not ask for credit to be given for this negative sum, it is argued that the proper approach is to allow a zero figure for the cost of accommodation. Applying Wells v Wells JR has suffered no loss by investing in the capital cost of accommodation from his other capital funds. No income would have been earned on those funds and the value of the capital will be preserved in the value of the property.

46. On behalf of JR it is submitted that Roberts v Johnstone was a pragmatic solution to the problem of providing accommodation to those who needed it. It is argued that the decision remains binding and that the percentage set by the Court of Appeal was "arbitrary". The former proposition is obviously correct. I do not accept the latter submission. The judgment of Stocker LJ is clear. 2% represented what was then the rate of return on risk-free investment. That is confirmed by the speech of Lord Lloyd of Beswick in Wells v Wells [1999] AQ.C. 345 at 380/381. The difficulty facing JR is that applying the rationale of Roberts v Johnstone in the current climate results in a nil award for the capital cost of accommodation. This consequence is discussed in the current edition of McGregor on Damages at 38.204.

It is high time that the Roberts v Johnstone *problem was tackled and a fair and proper*

solution found and adopted. The Law Commission looked into the matter some time ago but found it too difficult to formulate an acceptable solution and so recommended that the Roberts v Johnstone *method be retained. The Ogden Working Party is fully aware that the law needs to be righted and has it in mind to investigate the issue in the near future. What could trigger action on this front is a further reduction in the discount rate, the possibility of which, as we have seen, is very much in the air. It is true that, as the discount rate lowers, the multipliers increase, but an examination of the figures in the tables in Ogden shows that the increases in the multipliers do not come anywhere near to balancing, or off-setting the effect of, the fall in the discount rate. Ironically the injured party will get more for care but less for special accommodation. Indeed should the discount rate move into the negative, which is highly unlikely but did happen in the Guernsey case in the Privy Council of* Helmot v Simon*, the* Roberts v Johnstone *method becomes unworkable; it would produce a nil award.*

On behalf of JR it is submitted that "the approach in George v Pinnock should be followed and the court should assess accommodation by reference to a multiplicand based upon a positive percentage". The percentage suggested is 2.5% i.e. the current conventional rate for the Roberts v Johnstone formula. To avoid a windfall benefit the sum recovered should be capped at the capital cost of the accommodation to be purchased. Yet this would not avoid a windfall to JR's estate. The estate would include the total value of the property. Moreover, the value of the property almost certainly will have appreciated significantly.

47. In Manna the approach in Roberts v Johnstone was described as "imperfect but pragmatic". Were an annual figure of 2.5% of the value of the proposed accommodation to be subject to the current life multiplier, that description could no longer apply. The meaning of pragmatic is practical or realistic. There is nothing realistic about providing someone in JR's position with the capital value of a house which he will retain as part of his estate.

48. I consider that the editor of McGregor was quite correct when he opined that a fair and proper solution should be found to the conundrum of providing a claimant with the means to purchase special accommodation. He also was correct when he suggested that a negative discount rate would mean that the approach in Roberts v Johnstone would lead to a nil award. But I am not in a position to find "the fair and proper solution" to the problem as a whole. I am faced simply with the case of this Claimant. In his case maintaining the conventional approach would provide him with the full capital cost of the accommodation, something which clearly would be wrong. I have no evidence which would enable me to consider some other approach. For instance, given the current cost of borrowing, it might have been possible to say that the interest element on an appropriate mortgage (say £600,000 as the cost of a property less the amount of general damages) over a 25 year term would provide a reasonable figure, the cost of annual mortgage interest being the alternative method of assessment suggested in George v Pinnock. It was rejected in Roberts v Johnstone because the rate of mortgage interest at that time was so high that an award on that basis would result in full recovery of the capital cost of the accommodation. That is no longer the case. However, I have no evidential basis for using such a calculation and none was put forward. In other cases prior to the change in the discount rate it has been suggested that a defendant could take a reversionary interest in the property purchased in which event providing the full capital cost would not involve any windfall benefit; rather it would simply provide the claimant with the accommodation he needs for his lifetime. This solution (so it is said) would

remove the imperfection inherent in Roberts v Johnstone. It certainly is superficially attractive. But no such solution was proposed here and again I have no evidence which allows me to adopt it.

49. In JR's case I am satisfied that applying the Roberts v Johnstone approach, which I am bound to do, leads to a nil award in relation to the cost of special accommodation. I have to consider the return on a risk free investment as representing JR's loss. The only evidence available to me, namely the discount rate based on Interest Linked Gilts, shows that no return is possible on a risk free investment. This position may not persist. It may change very quickly. Were it to do so, a positive investment return may once again become available. But I have no evidence as to likely trends. Thus, I can proceed only the basis of the position as it is currently.

50. On behalf of JR it was submitted that the Defendant's argument required him to use capitalised sums in respect of loss of earnings when to do so would deprive him of monies intended to recompense him for a quite different loss. The Defendant's argument meant that JR would not recover his full loss as per Wells v Wells. This submission ignores the long accepted consequence of the Roberts v Johnstone approach as described by Tomlinson LJ in Manna. JR in the long run will recover his full loss because his estate will have the benefit of the full value of the accommodation. JR also argued that a nil award under Roberts v Johnstone would leave some claimants with no prospect at all of obtaining special accommodation which they ought to have. An example was given of a double amputee living in an upstairs flat whose earning capacity remained intact and whose care and other needs were limited. Such a claimant would have only modest capitalised sums against which to borrow (to use the Whiten terminology) and would be unable to purchase something which was vital to him and which was a loss resulting from the breach of duty. This example only serves to emphasise the need to find a proper solution to the accommodation conundrum. It does not provide a basis for allowing JR's claim for the capital cost of special accommodation.

Costs of care

51. The issues in relation to costs of care are relatively narrow. It is agreed that JR requires two carers around the clock. The question for me is whether the night carers should both be waking carers or whether one can be a sleeping carer. I have the benefit of the evidence of Mrs Maggie Sargent in relation to the circumstances in which a sleeping carer will be employed. Mrs Sargent has nearly 30 years of experience of organising and managing care packages for those such as JR. She explained the convention for a sleeping carer, namely s/he will expect to get up no more than twice in the course of a 10 hour night. Whenever such a carer is disturbed more than twice in a night, s/he will expect to be paid the waking night rate. Someone employed as a sleeping carer will have an expectation of limited disturbance during the night. That is the basis on which they take on such work. Very often they will be otherwise occupied during the day whether with their own family or some other job. If a sleeping carer is disturbed on anything other than an occasional basis, that person will not continue with the employment. Therefore, if the person for whom care is being provided is likely to require two carers more than twice in a night on any kind of regular basis, two waking carers must be employed. Nicola White, the care expert instructed by the expert, suggested that one might budget for one sleeping carer so long as the total disturbance

over the course of a year did not amount to more than 6 to 8 weeks. Mrs Sargent considered this to be the absolute maximum.

52. I was provided with night care diaries covering the period July 2016 to April 2017. They were not complete and they constituted a report after the event by the professional care team i.e. what they noted on speaking to JR's parents who continue to provide the night care for JR. They indicated inter alia the number of times JR had to be turned i.e. an activity requiring two carers. In tabular form these diaries show the following.

Month	One turn	Two turns	Three or more turns
July	17	4	-
August	8	6	9
September	1	2	9
October	8	10	2
November	8	5	8
December	4	2	9
January	-	-	25
February	-	2	18
March	1	5	12

The diaries for April 2017 of necessity were incomplete but showed a similar pattern to the other months in 2017 i.e. 11 occasions on which two carers were needed.

53. It is apparent that JR has suffered greater disturbance in recent months than in 2016. This is principally due to him suffering from a prolapsed disc in the lumbar spine which is causing pain and discomfort in the left leg. Efforts to deal with this short of operative intervention have proved unsuccessful. I have no expert evidence relating to this problem so I have no clear prognosis. However, it is to be noted that in the six months up to December 2016 JR required two carers on a total of 37 nights for those nights which were recorded. On an annual basis this amounts to over 10 working weeks i.e. significantly more than the maximum allowed for sleeping carers as identified by the care experts. Irrespective of any physical problem JR's difficulty is that he cannot move or roll without assistance. That position will not change. On behalf of the Defendant it is argued that a full care package implemented in suitable accommodation in conjunction with regular therapy will improve JR's sleep pattern. I am not persuaded of that proposition.

54. I am satisfied on all of the evidence that it is more likely than not that JR will require two waking carers for the rest of his life. The care package must be costed on that basis.

55. There is an issue as to the amount of case management required to manage the care package for JR. Nicola White, the Defendant's care expert, said that a care team leader (the cost of which was agreed between the experts as an extra £4 per hour for that individual) would take on much of the responsibility of a case manager. In her view 97 hours per annum would suffice – though her costings per hour are such that they equate to around 123 hours on the costings per hour of Mrs Sargent. Nicola White has expertise in relation to care packages and case management. However, her training was as an occupational therapist and that has been her main occupation to date. Within the last month she has worked as a case manager but not prior to that. Mrs Sargent has direct experience of case management stretching back 29 years. She said that the case manager should be budgeted on the basis of 150 hours per annum i.e. 3 hours per week. She said that JR would have a large care package. He was someone who wanted to be as active as possible which would require organisation and risk management. In those circumstances, she said that 3 hours per week as an average was reasonable. I accept that evidence and the case management element of the care package should be costed on the basis of 150 hours per annum of case management.

56. The care experts disagree on the proper level of carers' expenses. On a weekly basis the difference is trivial - £100 according to Mrs Sargent and £66.50 according to Nicola White – but it mounts up over a lifetime. The figure cannot be a precise calculation. I find that £80 per week is the appropriate amount.

57. There must be an allowance for employers' pension contributions. In Whiten Swift J concluded that 2% was the appropriate figure. Her rationale is set out at paragraph 176 of the judgment. Although the financial climate has changed since the time of her judgment, I consider that the rationale holds good. The parties will be able to calculate the appropriate figure.

58. On the main points of conflict on issues of principle as between Mrs Sargent and Nicola White, I have preferred the evidence of Mrs Sargent albeit that the extent of the disagreement between the two experts was modest. In relation to detailed costings there also was some disagreement. In some respects the costings put forward by Mrs Sargent were less than those identified by Nicola White. An example is to be found in the case management costs. As I have already observed, Nicola White's assessment of the annual need for case management was around 2/3rds of that put forward by Mrs Sargent but the hourly rate advised by Nicola White was significantly higher thereby reducing the gap in the overall annual figure. It is argued on behalf of JR that I should take a mid-point between Mrs Sargent and Nicola White where there is disagreement on hourly rate and the like. The argument put is that the figures are no more than a range and that taking a mid-point is the sensible course. I disagree with that proposition in the context of this evidence. A principal basis upon which I found the evidence of Mrs Sargent compelling was her long practical experience of managing care packages. That practical experience must inform appropriate costs as much as the need for particular levels of care or case management. It must follow that Mrs Sargent's assessment of future cost should be adopted. Thus, the annual sum for training and payroll will be as indicated by Mrs Sargent, namely £2,800 per annum. Similarly the hourly rate for case management will be that advised by Mrs Sargent rather than the higher figure put forward by Nicola White. The recoverable care and case management costs have been calculated on this basis.

Aids and equipment

59. JR requires adequate wheelchair provision for the rest of his life. He currently has a powered wheelchair for everyday use and a sports wheelchair which he uses to play football. It is accepted that he also should have a manual wheelchair for those occasions when the powered chair is inoperative and for other occasional use in the home. JR's case is that he should have two powered wheelchairs: one for use indoors and one for outdoor use. The Defendant's case is that this would be disproportionate and unreasonable. So long as the normal powered wheelchair was of a kind capable of all terrain use, a second powered wheelchair cannot be justified. As to the indoor chair, JR called some evidence (albeit not from an expert with any therapeutic expertise) that this should be a standing wheelchair. The Defendant relies on expert physiotherapist and occupational therapist evidence which is to the effect that a standing wheelchair would not be appropriate for JR.

60. Amy Barber, the occupational therapist called on behalf of JR, recommended that he should have two powered wheelchairs. One was identified as a Salsa wheelchair, a relatively basic model, for use indoors. The other was an all-terrain wheelchair to use outdoors. She drew a parallel with an uninjured person not wearing the wellingtons he had used for a country walk once back home in his living room. Rather, such a person would take off the wellingtons and put on a pair of indoor shoes. The difficulty with that parallel is the overall annual cost of wellingtons and shoes at most would be £200 whereas the purchase price of an ordinary indoor wheelchair would be £6,000. Assuming a 5 yearly replacement cycle and taking into account the cost of maintenance and the like, this equates to an annual cost approaching £1,500. I do not consider that this is reasonable. On behalf of JR it is said that, if he has to rely on a single wheelchair, he will need to remain outdoors whilst the wheelchair is cleaned. This presupposes that his accommodation will not have a hallway or covered porch area where this can be done. It seems to me that this kind of area would be a sensible provision irrespective of the number of wheelchairs used by JR. The powered wheelchair should be one which is capable of all-terrain use and includes a riser facility.

61. This outcome does not provide for a standing wheelchair. Such provision is supported by the assistive technology expert called on behalf of JR. However, this expert is not qualified to express an opinion as to the therapeutic merits or otherwise of a standing wheelchair. As I have already observed the Defendant's physiotherapy and occupational therapy experts do not consider that JR is suitable for such a wheelchair. I have no expert evidence to contradict this view.

62. There are various items ancillary to a wheelchair which remain in dispute. First, JR currently uses a Jay 2 cushion. Amy Barber considers that this will suffice for the time being. However, there may come a time when he requires more sophisticated seating. At present that would be what is known as consular seating, the current annual cost of which is £1,700. Whether a different type of seating will become necessary or appropriate will emerge when JR's seating needs are reviewed. I do not consider that the evidence justifies recovery of the cost of consular seating for life. Rather, a sum must be allowed on a contingent basis for the prospect of such seating in the future. Using a broadbrush approach and including the cost of seating reviews within the figure recoverable, I assess the future cost of seating as a contingent sum of £15,000. If this contingency arises the cost of Jay 2 cushions will no longer be incurred. Thus, the claim

for those cushions must be reduced to take account of the possibility of a different type of seating being introduced. Whatever the total sum is for Jay 2 cushions on a multiplier/multiplicand basis should be reduced by £5,000. It is not clear to me whether the agreed multiplicand is £447 or £847 which is why I am unable to give a figure in £s.

63. Second, the Defendant challenges the proposition that JR requires a waterproof cape to use in inclement weather when out in his wheelchair. It is argued that it merely replaces the outdoor clothing which would have been required in any event. I reject that suggestion. Someone confined to a wheelchair needs to have a full waterproof covering which would not be afforded by a normal waterproof coat. It was said by the Defendant's OT expert that JR would not wear such a garment in any event because he is fashion conscious. So he may be but I regard the proposition that he would be willing to be soaked to the skin to preserve his fashion status as fatuous. The cost of a cape will not be an annual expense. A replacement every 3 years would be appropriate. Using the current cost of a cape (£116.20) and a multiplier of 19.06, the sum recoverable will be £2,214.77.

64. Third, there is an issue as to whether a pump will be needed for the tyres of any of JR's wheelchairs. Such a need will not arise if the chairs have solid tyres which is apparently the preferable position. I follow the suggestion of the Defendant and I award £100 under this head of damage. Finally there is a dispute over whether the cost of wheelchair trays should be recoverable. I can see no reason to disallow the cost completely. Equally, replacement every 2 years cannot be justified. I allow a lump sum of £1,000 for this item.

65. The other items of equipment in respect of which a recoverable loss arises are bed/ mattress, changing bed and slings. Claims are made for the cost over JR's lifetime of electric toothbrush, electric shaver and tumble drier. I reject these claims. Those items are used by a large proportion of the population and expenditure on them cannot reasonably be attributed to JR's injuries.

66. In relation to a bed the Defendant argues that what is known as a profiling bed is reasonable. I have been provided with an extract from the manufacturers' brochure for this type of bed. It is institutional in appearance. It is not a piece of furniture which anyone would choose to place into a domestic bedroom. Although its cost is relatively modest, the Defendant accepts that it would need replacing every 5 years which says something about its quality. On behalf of JR it is said that a Theraposture bed should be provided. This has a much higher build quality and would require replacement only once every 10 years. It is significantly more expensive than the bed suggested by the Defendant but its appearance is akin to an ordinary domestic bed. It is the type of bed for which an award very frequently is made in cases of this kind. I am satisfied that the cost of a Theraposture bed based on replacement every 10 years together with the relevant annual maintenance cost is recoverable. In addition a modest lump sum to reflect the cost of portable pressure mattresses will be recoverable. I award £2,500 under this head.

67. A similar issue arises in relation to a changing bed or bench. Is the cost of a foldaway contoured bench recoverable or is it reasonable for JR to use a more functional item albeit one which is durable? The aesthetics of a changing bed or bench are not of

significance. I also am not satisfied that being able to fold the bed or bench away is of such importance as to justify the significant extra cost. I conclude that the solution identified by the Defendant's OT expert is appropriate. The material appended to that expert's report indicates that the price she quoted was part of a special offer. I consider that £1,500 should be allowed as the cost of a functional changing bench or bed. Applying the Defendant's multiplier based on replacement every 5 years the sum recoverable will be £14,265.

68. Slings for hoists probably could be interchanged between the mobile and ceiling hoists though this would depend on the fittings and attachments. Whether this would be a reasonable arrangement is another matter. It would be inconvenient and time-consuming to have to change them over whenever that was required. The process of moving JR is problematic enough without adding the complication of having to change over a set of slings. I consider that separate slings are justified. However, I see no reason why some of the slings should require annual renewal. The Defendant suggests a compromise figure of £20,000 to cover this head of damage. I agree with that suggestion and the sum recoverable will be £20,000.

Physiotherapy

69. The parties agree that JR will have a lifelong need for significant physiotherapy input. The dispute between the parties concerns four areas: the nature and extent of the physiotherapy required in the future; whether water based therapy should form part of the physiotherapy package; whether massage therapy should be part of the package; whether provision should be made for a Lycra suit.

70. JR currently has quite an intensive physiotherapy regime. He has two conventional land based sessions each week and one session of physiotherapy in a pool. The latter form of therapy has been given differing nomenclature at different times: hydrotherapy; water therapy; aquatic therapy. Whatever name is attached it is part of a physiotherapy regime provided by the same therapist as the person carrying out land based therapy. The intensive regime is in place for two reasons: JR's spinal problem; the lack of any physiotherapy at all from JR's 18th birthday to the point at which funds became available by way of interim payment in these proceedings. The intensive physiotherapy in the period since the interim payment in the middle of 2015 has achieved considerable improvement in JR's posture as is apparent from "before and after" photographs produced in the course of the trial.

71. The current intensive regime will not be required from this point onwards. Denise Wills, the physiotherapy expert instructed on behalf of JR, split the future physiotherapy needs into two phases. First, there was the period from now until JR reaches his 40th birthday. Her opinion was that JR will require 26 sessions per annum based on land and 6 sessions per annum of water based therapy. To these must be added 6 sessions per annum of carer training. JR will have a large team of carers. There is bound to be some turnover and refresher training will be needed from time to time. It is not sensible to try and combine training with ordinary physiotherapy sessions. Mrs Wills also advised that the physiotherapist will need to attend at least one clinic with JR each year, to attend multidisciplinary meetings twice a year (those meetings amounting to a double session on each occasion) and to undertake 4 additional sessions for musculo-skeletal problems. Mrs Wills also considered that allowance must be made for administrative costs i.e.

report and note writing by the treating physiotherapists. The Defendant's physiotherapy expert, Eileen Kinley, considered that 24 sessions per annum will be sufficient to cover all physiotherapy requirements: hands-on sessions, training, attendance at clinics and attending meetings. She did not see the benefit of water based therapy in JR's case though she accepted that in her own practice she had used such therapy with adults suffering from cerebral palsy. She asserted that charging for administration by those providing physiotherapy on a private basis was a recent development.

72. I am satisfied that JR's physiotherapy requirements to his 40th birthday will be significantly greater than that advised by Mrs Kinley. The reality of her evidence is that JR would receive around 12 sessions per annum of physiotherapy from a trained physiotherapist. It is true that this equates to what was reported in 2012 as the median provision of paediatric physiotherapy to NHS patients but I regard this fact as being of little value in JR's case. The report was not a reflection of what physiotherapists considered to be the appropriate provision; rather it was what could be provided in 2012 within NHS budgets. I am satisfied that 12 sessions each year would be wholly inadequate to maintain JR's current position; never mind to hope for any improvement. I am satisfied also that the modest provision of water based therapy advised by Mrs Wills is a sensible and reasonable adjunct to land based physiotherapy. Thus, the hands-on sessions required by JR will be 32 per annum. To that must be added the costs of training, attendance at meetings, attendance at clinics and administration as advised by Mrs Wills. These are proper and proportionate costs. Mrs Kinley's evidence that charging for administration was a recent development was hardly helpful. The current providers of physiotherapy already make a charge for administration. However, I do not consider that specific sessions to cover musculo-skeletal issues can be justified and no recovery can be made in respect of those.

73. The second phase identified by Mrs Wills is from JR's 40th birthday onwards. She said that he then will require an increase in physiotherapy. The basis of the proposed increase is a likely deterioration in JR's condition which will require greater physiotherapy input. Mrs Wills's report was written by reference to medical evidence which no longer forms part of the evidence in the case. In oral evidence she said that her own clinical experience was that someone in JR's position would deteriorate with age. That may be right though there is no unequivocal medical opinion on the issue. Moreover, there is no satisfactory evidence that additional physiotherapy once JR has achieved his 40th birthday would prevent or ameliorate any such deterioration. I conclude that JR should recover physiotherapy costs for life as set out in the preceding paragraph.

74. The issue as to the appropriateness of water based therapy was greatly reduced by the fact that Mrs Wills advised only 6 sessions of such therapy each year. Although Mrs Kinley said that it was not a form of therapy identified in NICE guidance and that she did not see the benefit of it, she agreed that water was a permissible environment in which to carry out physiotherapy. Given the very limited extent to which Mrs Wills advises such therapy and in view of my acceptance of her approach overall to the appropriate frequency of physiotherapy sessions, I accept that water based therapy properly should play a part – albeit a modest part – in JR's therapeutic regime. Although JR's subjective reaction to particular kinds of therapy is of limited importance when assessing the reasonableness of a particular therapy, his reaction is not irrelevant. I have seen video material which shows his enjoyment of and enthusiasm for water based activity. It supports the view that a modest element of water based therapy is justified. Whether this can justify the provision of a home hydrotherapy pool is a matter I shall

consider when I deal with recoverable special accommodation costs.

75. The sum claimed for massage therapy is modest in terms of annual cost but very substantial once a lifetime multiplier is applied. JR is said to have indicated that he felt the benefit of massage therapy when he has received it in the past. That does not show a therapeutic benefit. This is to be distinguished from water based physiotherapy which does have such a benefit even if it does not necessarily have to take place in the water. Massage therapists are not a registered profession or vocation. In reality an experienced physiotherapist will have some training in massage techniques. Mrs Wills acknowledged that it would be possible for a care worker to be trained in massage so long as he or she had sufficient confidence. I am satisfied that any requirement for massage which needs to be met within the award of damages can be achieved by a modest lump sum to cover future training of members of the care team. I assess the appropriate sum as £5,000.

76. JR currently has a Lycra suit which is a type of second skin suit. It is not easy to put on and it can be uncomfortable to wear. However, he does wear it at the moment. Mrs Wills's view was that it helped to improve JR's posture. It opened his chest and thereby improved communication and speech. Mrs Kinley saw potential benefit from such a suit but probably only when JR was relatively young. When pressed Mrs Wills conceded that the benefit from a Lycra suit was debateable. She felt that JR might continue to use it but that could not be said with any certainty. She agreed in evidence that it should be treated as a contingent item. The capital cost of such a suit is just over £6,000. I conclude that a sum equivalent to the cost of three such suits is recoverable, namely £18,000.

Accommodation

77. Although I have concluded that there shall be a nil award in respect of the capital cost of special accommodation, a very substantial claim is made for adaptation costs. These will be recoverable to the extent that they are reasonable and justified irrespective of the lack of recoverability of the capital purchase price of any property.

78. JR has made an offer for a property in Dore in Sheffield which has been accepted subject to contract. The agreed purchase price is well in excess of £1.5 million. The property is known as The House. It is a large property on three stories. The square meterage of the property is over twice that advised by Mr Docker, the accommodation expert instructed on behalf of JR, as being necessary to meet JR's reasonable needs. It is not argued on behalf of JR that the purchase price of The House would be a reasonable sum for special accommodation even if the capital cost were recoverable. Whether this property would be a reasonable use of JR's resources will be a matter for the Court of Protection. It is not something on which I can or should made any further comment. However, it would not be appropriate to assess the reasonable adaptation costs based upon the assumption that The House is to be purchased. Rather, I must consider the position on the basis that appropriate and reasonable accommodation does become available and is purchased. As I have already observed, the accommodation currently occupied by JR is wholly unsuited to his needs.

79. Mr Docker thus far has not been able to identify a particular property of the appropriate

dimensions in any suitable area of Sheffield. His order of preference for a property is as follows: bungalow on a flat plot; flat plot on which to build from scratch; house on two floors with land available to build a ground floor extension; The House (or some other house on three floors). In terms of suitability The House falls well below the other options. It is so large that it would be absurd to build on an extension on the ground floor but the corollary of that is that JR would have his living space on the first floor which creates obvious difficulties. I shall discount The House or some other property like it. Mr Docker in fact has priced the cost of necessary adaptations to The House. His view is that around £360,000 would be the sum required. His estimate of the cost of adapting a bungalow would be only some £65,000 more than that with the purchase price of a bungalow being some £600,000 less than The House. The figures remove a property such as The House from consideration.

80. The costs of adapting a property must be assessed on a theoretical basis. The evidence of Mr Docker and the Defendant's accommodation expert, Mr Withey, is based on the assumption that a suitable bungalow can be found in the Sheffield area. Since that is Mr Docker's preferred option, I shall adopt that approach. The experts disagree as to how much a suitable bungalow would cost. Mr Docker believes that bungalows command a significant premium over two storey houses and suggests that £1 million will be required to obtain a suitable property. Mr Withey said that £700,000 would be a reasonable estimate. Strictly it is not necessary for me to resolve the issue given my conclusion vis-à-vis the Roberts v Johnstone calculation, a conclusion which would be the same whichever estimate were the more accurate. In oral evidence Mr Withey said that his estimate was based on research with local estate agents in Sheffield. The details of this research never found its way into any written report so it is impossible to judge the reliability of the research. Moreover, the bungalows identified by Mr Withey in his original report – none of which was in an appropriate area – were priced up to £800,000. If the appropriate capital sum were to be relevant for the purposes of a Roberts v Johnstone calculation, I find that the capital cost of an appropriate bungalow will be £900,000.

81. In the joint report prepared by Mr Docker and Mr Withey on 14 March 2017 the cost of adapting and extending a suitable bungalow was assessed by them at £423,022 and £284,149 respectively. Because there is no specific property in view, these figures are based on usual building costs and the total area required to accommodate JR, his carers and his family. The disagreement between the experts essentially is twofold: the appropriate rate per square metre for the basic cost of building extensions; the total floor area required to meet JR's needs.

82. As to the first Mr Docker's evidence was that he analysed recent tender prices for similar projects he is conducting in the South Yorkshire area and he concluded from this analysis that £1,750 per square metre was an appropriate rate. I have no reason to doubt the validity of his analysis but I was not provided with any supporting evidence from the tender material so I was not put in a position whereby I could make my own assessment of the rate asserted by Mr Docker. Mr Withey told me that £1,650 per square metre was an attainable figure. He based that figure on what builders told him. That is much less satisfactory as a basis of calculation than the evidence of Mr Docker whose figure at least was based on some proper analysis of tender prices. I prefer the evidence of Mr Docker on this point.

83. Mr Docker allowed space for a bedroom for carers in his calculation of the square meterage required for JR's needs. This is not consistent with my conclusion in relation to the night carer regime which will be required. To that extent his figure must be reduced. I am satisfied that a proper day room will be required for the carers given the size of the carer team and the nature of the care programme to be provided. Mr Docker's adaptation costs include the cost of providing a garage of more than usual width and/or length. Mr Withey's budget allowed only for a carport. I consider that, for someone such as JR, an enclosed garage is reasonable and appropriate provision. Both Mr Docker and Mr Withey provided for additional floor area to allow for room size discrepancies and the like. A bungalow purchased for adaptation inevitably would involve some areas which could not be used to maximum efficiency. In percentage terms Mr Docker allowed for around 11% of the space being wasted or not used efficiently. Mr Withey accepted that some loss of space would occur but allowed for around 5% wastage. I accept this lesser figure.

84. The outcome is that there must be some reduction in the figure for adaptation put forward by Mr Docker. It is not possible to calculate that figure in a precise mathematical fashion. Before betterment I consider that the figure for adaptations should be assessed in the sum of £400,000. Without a hydrotherapy pool (to which I shall turn shortly) betterment will be £60,000.

85. The adapted property will involve increased running costs over and above the property which JR otherwise would have occupied. The difference between the figures provided by the experts is just over £2,000 which consists almost wholly of maintenance of fixed special equipment, a sum allowed for by Mr Docker but not Mr Withey. It is accepted on behalf of the Defendant that much of this maintenance cost is not covered elsewhere and should be recoverable. On the other hand the Defendant argues that some of the maintenance cost should be reduced to allow for the economies to be gained from the fact that JR will be sharing the accommodation with his family. It is said in written submissions that the reduction should be around 40%. No clear rationale is given for this level of reduction. The figures set out at paragraph 10 of the joint report of the experts relate to the property which JR will be obliged to live in due to his injuries and the maintenance of equipment which he will have due to his injuries. I fail to see how any genuine economies will be made by reason of presence of his parents and his sibling. There is a sensible argument for the proposition that some of the costs identified at paragraph 10 would have been incurred in any event. A precise arithmetical calculation is not possible. I consider that it is appropriate to reduce the figure for increased running costs by 25%. In very round terms that gives an annual figure of £7,000 which will be recoverable for life.

86. The costs of relocation in terms of legal fees and stamp duty will be dictated to by the cost of the bungalow to be adapted i.e. £900,000. I assume that the same will apply to surveyors' fees. I am not in a position to give precise figures. I anticipate the recoverable sum will be around halfway between the figures provided by the experts. Some modest discount must be given for the fees and duty which would have been payable on the kind of home in which JR would have lived had he been uninjured. The cost of fitting out and furnishing the special accommodation is dealt with as a separate head by the experts. They are some way apart on their figures. No reasoned basis is given by either as to their figures. I can do no more than take a halfway point in relation to the initial cost i.e. £18,000 for furniture and fittings. It is not apparent how the renewals figures are arrived at by either expert. They do not appear in the schedule of

loss and are not addressed in the written submissions. A modest lump sum is appropriate, namely £20,000.

87. The final issue in relation to accommodation is whether a hydrotherapy pool should be provided at JR's home. I have already indicated that the recoverable physiotherapy costs include six sessions per annum of water based therapy. These sessions need not be the only water based activity which JR undertakes. His carers will be trained to provide JR with water based exercises and simple therapeutic measures. Doubtless his parents also will engage with him in that context. However, this level of activity would not begin to justify the provision of a pool at JR's home. It would not be reasonable or proportionate. This case is a far cry from the circumstances which confronted Warby J in A v United Hospitals (supra). JR likes the water and is relaxed by it. He would enjoy having his own pool. But this is a case in which I can and should take an approach similar to that which I took in HS v Lancashire Teaching Hospitals [2015] EWHC 1376 QB, namely make provision for the cost of visiting a local hydrotherapy pool (of which there are several) on a regular basis. The evidence of Mrs Kinley is that a single session costs around £55 depending on the pool being used. Taking into account those visits made as part of the formal physiotherapy regime I consider that 35 visits to a pool each year should be reflected in the award of damages i.e. an annual cost of £1,925. It is very likely that the frequency of visits in the period until JR gets to middle age will be greater than 35 per annum with the frequency reducing thereafter. It is not possible to reduce that to a detailed calculation. There is no reason to suppose that JR will not continue to appreciate water based activity throughout his life. Thus, the annual cost of £1,925 must be subject to a full life multiplier. It will be appreciated that this capitalised sum is significantly greater than the cost of a swim spa pool of the kind suggested as an alternative to a hydrotherapy pool by Mr Withey. This suggestion came very late in the day in a letter written on the third day of the trial. Mr Docker dismissed the suggestion for someone with JR's functionality. He said that such a pool would be dangerous for JR and/or his carers. I agree. The viability of that kind of pool was not increased by its last minute introduction into the case; rather the reverse.

Assistive technology

88. Much of the claim made for assistive technology – which will be of particular importance to JR as someone with an interest in IT and photography and with the ability to use such equipment – is agreed with such dispute as there is being as to frequency of replacement. Other items are more controversial. JR's assistive technology expert raised the issue of a standing wheelchair, an issue with which I have dealt under the head of aids and equipment.

89. It was agreed that JR is entitled to a sum for what is termed entertainment software enabling him to engage in gaming. There was an issue as to the frequency with which this needed to be replaced. In the course of the evidence the experts agreed that four yearly replacement was appropriate and that is the basis on which the capitalised sum will be calculated. The experts also agreed in the course of the evidence that additional IT items required due to JR's situation should be replaced on a like basis. The cost on each occasion was the subject of a compromise figure of £850.

90. The expert instructed on behalf of JR considered that he should recover the cost of software which would enable JR to make music in the same way as someone uninjured

might play a musical instrument. He accepted that there should be some discount from the cost of the software to allow for the cost of a notional musical instrument. He argued that this cost should be met on a full lifetime basis. This part of the assistive technology claim is speculative. I have no specific evidence that JR has such an interest in music that he might sensibly be expected to create his own music. Even if he were to do so, there is no reason to suppose that he is different to the many people who take up an instrument, persist with it for a few years and then allow it to drop. I agree with the submission made on behalf of the Defendant that the right approach is to identify a contingency figure based on the current cost of the software. That cost is £3,385. Taking into account the cost of the notional instrument, I assess the contingency figure under this head as a one off sum of £7,500.

91. On behalf of JR a claim is made for assistive software and for customisation of that software. The assistive software is designed for those in JR's situation in order to enable them to control their environment and to access material such as photographs and music. The expert instructed on behalf of the Defendant was not convinced by the need for this software. More significantly, he considered that it would not be necessary for the software to be customised for JR's use, the cost of customisation being the bulk of the claim. He said that JR plainly is adept at using IT and that an off-the-shelf system could be used by him. I award the cost of the software (£400) with replacement every 3 years. I do not allow for the cost of any customisation.

92. Assessment and installation costs were put at £3,000 on a tri-annual basis by JR's expert and at £2,000 by the expert instructed by the Defendant. In evidence they agreed that a compromise figure of £2,500 on a tri-annual basis was reasonable. A similar compromise was reached in relation to the annual extra cost of insurance taking into account the nature of the equipment to be insured i.e. the midway point between the relevant figures so as to give an annual cost of insurance in the sum of £175.

93. When JR moves into special accommodation, there may be a gate to the property which is kept closed for security purposes. Whether there will be such a gate will depend on the property purchased. In the event that there is a gate, it is argued that there should be a gate opener operable by JR so that he can come and go from the property as he wishes. I agree that he is entitled to his independence. It is apparent that, at present, he is quite capable of going off alone. How long this will be the case is impossible to say. It also is impossible to say whether there will be a gate at all which has to be opened. I consider that a contingency figure is appropriate for this facility. It is said that a gate opener would cost £3,000. This figure is not disputed by the Defendant's expert. If there were to be such an opener, it is said that it would require replacement every 7 years. I have no satisfactory evidence as to why replacement would be required with this frequency. I shall award £7,500 as a one off sum for a gate opener. What certainly will be found at JR's special accommodation will be a door or doors to the outside world which will have to be opened when any visitor wishes to come in. If JR were uninjured he would be able to answer the door in the ordinary way to his friends. It is reasonable that he should be enabled to do so. It is agreed that the capital cost of this will be £1,600. Replacement every 10 years will be reasonable.

94. At present if JR needs assistance in an emergency or when no-one is in view or hearing distance he can use his mobile telephone. It is accepted that it would be reasonable and necessary for him to have a back up system by which he could summon help. The

expert instructed by the Defendant considered that a wireless pager would be the best form of back up. He agreed that it was a basic system but, as he put it, basic is good in this context. It may be basic but it is reliable and durable. I consider that this is the appropriate level of emergency or alarm equipment. It would be in the possession of one of JR's care workers at all times. If he wanted to summon his mother or father rather than a care worker, he would be able to use his telephone. The cost of a pager is £600 which will be recoverable with replacement every 10 years.

95. The expert instructed on behalf of JR suggested that JR should recover part of the cost of a multi-room AV system. He said that JR would spend more time indoors than the average person and this factor justified this cost as being due to his injuries. However, he deducted two-thirds of the cost of the system on the basis that this would have been purchased even if JR had been uninjured. None of this was rationalised in his report and it was not developed with any cogency in his oral evidence. I agree with the expert instructed on behalf of the Defendant. If JR decides to purchase a multi-room AV system that will be a matter of personal choice unconnected to his injuries. The sum claimed is not recoverable.

Travel and transport

96. JR currently owns a VW Caravelle adapted to enable wheelchair use. He purchased it relatively recently after receipt of the interim payment. The cost of the vehicle was £46,000. On behalf of JR it is accepted that some credit must be given for the cost of whatever vehicle he would have owned had he been uninjured. It is suggested that this figure should be £3,000 over the five-yearly cycle of replacement. I consider that to be inadequate. £5,000 should be deducted from the five-yearly cost of the adapted vehicle. It is also accepted that the adapted vehicle will have a resale or trade-in value for which credit must be given. I agree that £7,000 as suggested on behalf of JR is an appropriate sum. Thus, the net cost of a Caravelle will be £34,000 every five years.

97. The Defendant's occupational therapy expert argued that the appropriate vehicle was a Renault Master. This was the type of vehicle which JR rented under the Motability Scheme prior to receipt of the interim payment. The Renault is significantly cheaper than the VW Caravelle. The Defendant's expert said that the Renault was higher and roomier than the VW and thus was more suitable for someone with the care team JR would have. She did not say that the VW was unsuitable. That is hardly surprising since it is regularly the vehicle of choice in cases such as this. It is not without significance that JR has purchased a VW vehicle rather than a Renault Master. He and his family did so doubtless because a VW Caravelle is very like an ordinary family car albeit bigger whereas a Renault Master is derived from a commercial van and feels very much like a van. I am quite satisfied that it is reasonable for JR to have a VW Caravelle and recovery under this head will be on that basis i.e. £34,000 on a five-yearly basis.

98. The recoverable costs ancillary to the purchase of a vehicle are insurance and extra mileage. The current cost of insurance for the VW Caravelle is known i.e. £3,190.48 per annum. That covers all drivers and includes breakdown cover. No NCD yet applies to the policy because it has only recently been issued. It is reasonable to expect that there will be a reduction to allow for NCD over the coming years. On an annual basis £2,000 will be recoverable for the cost of insurance i.e. allowing for NCD and for what JR would have had to pay by way of insurance premiums had he not been injured. There is

a dispute about the extra mileage which will occur because of JR's injuries i.e. because he will have to make every journey in a vehicle. The rival figures are 5,000 and 2,500. Neither figure has any arithmetical basis. I consider that the mid point would be appropriate i.e. an extra mileage of 3,750 each year.

99. The other cost under this head is the additional sums spent on holidays. It is agreed that it is appropriate for JR to purchase a caravan somewhere in the UK since that will always be suitable for his needs and it will not involve issues of finding special accommodation. The Defendant's expert has provided costings for a normal caravan (which would have been a cost incurred even if JR had not been injured) at £16,995 and for an adapted caravan in the sum of £36,000. As to the latter cost the expert instructed on behalf of JR is in agreement. The Defendant's expert asserted that the additional cost was £16,959. I am wholly unable to see how this figure was achieved. The difference between her two figures is just over £19,000. That is the starting point for the cost of a caravan.

100. There is a dispute as to how often the caravan would need to be replaced. Every 10 years was the submission made on behalf of JR whereas the Defendant argued for every 20 years. I agree that a 10 year replacement cycle is excessive. The caravan will last for 20 years before the need for replacement. However, there will be some maintenance costs from time to time. These are incapable of precise calculation. I shall allow for those by setting the overall figure for the cost of a caravan at £22,000 recoverable on a 20 year cycle.

101. It is reasonable for JR to expect to go on holidays abroad from time to time. Had he not been injured he would have taken at least one holiday each year to a foreign resort of some kind. On occasion he would have taken a long haul holiday. It is agreed that, whenever he goes on holiday, he will need a team of six carers. This cost was put by the Defendant's expert at £1,500 per carer per annum. The expert instructed by JR argued for £2,000. Neither expert provided any detailed evidence to support these figures. The cost presumably assumes a two week holiday somewhere in Europe involving flights, travel, accommodation and ancillary expenses. I consider that the figure of £2,000 for each carer is a more realistic estimate of the cost.

102. In relation to JR himself it is argued on his behalf that it will cost £6,000 more per annum for him to go on holiday than it would have done had he not been injured. In evidence the expert instructed on his behalf suggested that it would be reasonable for him to rent a villa of a size suitable for his team of carers and with appropriate access and that this would involve significant extra cost. I consider that, whilst this may be a sensible proposition in terms of the type of holiday which JR might consider, much of the extra cost would be offset by the fact that the carers would be accommodated within the villa so as to avoid hotel or accommodation costs for them. JR's expert also pointed out that JR would want to hire a vehicle to enable to him to travel around whilst on holiday. She said that the cost of hiring an adapted vehicle would be much higher than hiring an ordinary car. That must be right. Had he not been injured, JR would have been able on holiday to get about with reasonable ease and at modest cost. The Defendant's expert said that the added cost of the holiday so far as JR himself was concerned would be £170 per holiday i.e. the difference between a 3* and a 4* hotel in a Thomas Cook brochure. The rationale for this was that a 4* hotel would have the necessary facilities to accommodate JR. This expert allowed for no other additional cost in relation to JR

himself. I am satisfied that the figure of £170 is a substantial underestimate of the extra cost of a holiday. It takes no account of anything other than the immediate accommodation needs of JR. The research lying behind the figure provided can hardly be said to be rigorous. Nonetheless, I agree that the additional cost of £6,000 per annum simply in relation to JR is excessive. I assess the appropriate figure in the sum of £2,500 per annum. Thus, the award for annual holidays will be based on a multiplicand of £14,500.

103. I have not included in that figure any allowance for an occasional long haul holiday for which the cost of accompanying carers will be significantly greater and for which the costs relating to JR himself will be significant. For instance, it would be reasonable for him to travel long haul in business class so that he can lie down. The Defendant submits that a lump sum contingency figure would be appropriate to deal with the occasional long haul holiday. I agree with that suggestion. I assess that figure in the sum of £25,000.

Court of Protection Costs

104. JR is a protected person and he will be so for the rest of his life. It is agreed that he will need a Deputy. He has two parents, both of whom are relatively young, which means that there will be adult support for JR for many years to come. He will not be dependent for every day-to-day decision on his Deputy. On the other hand, without being disrespectful in any way to JR's parents, whose devotion to JR and his needs over the last 24 years has been immense, they are not financially sophisticated. One might contrast them with the parents in Whiten. It follows that this will be a relatively intense Deputyship with significant input, particularly in the early years, from the Deputy himself.

105. I heard evidence from Christine Bunting on behalf of JR and Hugh Jones on behalf of the Defendant. Both are very experienced in Court of Protection work and each regularly provides evidence in cases of this kind. There is no doubting the long experience and considerable expertise of both experts. In relation to the past costs of the Deputyship there is an agreed sum. I am concerned only with the future. The principal dispute between Ms Bunting and Mr Jones is the one which appears to arise in most cases of this kind. What is the level of input which will be required from the Deputy and his team and what level of seniority of staff will be appropriate? They agree as to all the various tasks which will fall on the Deputyship. They disagree as to how much time will be taken in discharging them, as to the extent to which some of the work will be covered by others involved in JR's care such as the case manager and whether a particular grade of fee earner will be required for more or less of the time. Most of the other recurring expenses are agreed or flow directly from the Deputyship costs i.e. costs' draftsman's fees and VAT.

106. Ms Bunting's assessment is that the early years of the Deputyship will be intensive and labour intensive compared to subsequent years when significant involvement of the Deputy will be far less. Mr Jones agrees with that general approach though his view of the time required of the Deputyship at any point of JR's life is different to and less than that of Ms Bunting. Ms Bunting provided a clear breakdown of the hours required in each year and of the level of fee earner required. For the first full year during which she assumed that steps would be taken to purchase a property, to commission the necessary

adaptation works and to commence those works, Ms Bunting assessed the costs at £30,605 net of VAT. She identified 60 hours or just over an hour a week on average being required by a Grade A fee earner i.e. the Deputy himself. She said that a further 145 hours would be required to be split almost equally between Grade C and Grade D fee earners. She also said that two home visits by the Deputy would be required during this period. In the second year she saw the hours reducing – 40 hours Grade A, 45 hours Grade C, 62 hours Grade D – although the Deputyship would still be relatively intensive. She assumed that work on the property still would be continuing. In the third and fourth years Ms Bunting reduced the hours still further – 30 hours Grade A, 45 hours Grade C, 40 hours Grade D – the work now being required as JR settled into his new home. She then set out the costs of the Deputyship on a continuing basis thereafter with much reduced hours – 12 hours Grade A, 30 hours Grade C, 40 hours Grade D.

107. Mr Jones's approach was less structured than that of Ms Bunting. His core position was that he has had long experience of acting as a Deputy (which is true) and that his figures represented what he thought would be recoverable for each year. It is not doing a disservice to him to say that his evidence was impressionistic. For instance, in respect of the first full year post award of the Deputyship he said this in his report: "I would normally anticipate costs in the region of £10,000 plus VAT and disbursements in such a year. I am mindful however that this is the first year of deputyship and that it is therefore likely that the deputy and his staff will be required to spend more time than in subsequent years….I would therefore consider £12,000 plus VAT and disbursements to be reasonable in this case." He did not provide any breakdown as between types of fee earner. In his oral evidence he accepted the analysis of the various elements of the Deputyship as described in some detail in Ms Bunting's report but he said that the fees he identified for any given year were what he charged. This does make difficult to compare the evidence of the two experts in any sensible fashion.

108. In those circumstances, I do not propose to engage in a detailed analysis of the figures provided by each expert since I would not be comparing like with like. It is accepted as a fundamental point that the Deputyship will be more intensive in the early years than thereafter. That must be reflected in the sums awarded in relation to those years. I consider that the Deputyship will be relatively intensive throughout. Because JR has a genuine degree of capacity, albeit not sufficient for him to manage his own affairs, there will be consultation with him in a way that there would not be with someone with little or no cognitive ability. That is something to take into account when assessing the continuing costs of the Deputyship. I set out below in tabular form the sums put forward on each side and the award in relation to each period which I consider to be appropriate. The figures are purely the Deputy's professional fees net of VAT and without any reference to consequential fees and costs.

Year	Claimant £	Defendant £	Award £
1	30,605 plus cost of 2 visits	14,000 inclusive of 2 visits	30,000 inclusive of visits
2	21,492 plus cost of 2 visits	9,000 inclusive of 2 visits	20,000 inclusive of visits
3	17,040 plus cost of 1 visit	8,000 inclusive of 1 visit	15,000 inclusive of visits
4	17,040 plus cost of 1 visit	8,000 inclusive of 1 visit	15,000 inclusive of visits

5 onwards	11,232 plus cost of 1 visit	7,000 inclusive of 1 visit	10,000 inclusive of visits

To an extent the awards I have made are impressionistic. I have not attempted to apportion the hours as between fee earners or to give a detailed breakdown of the hours recoverable. Since the Defendant's expert took such an approach, I hope that I will not be criticised for doing the same. The essence of my approach is that, whilst I can see some areas in which Ms Bunting has overestimated the involvement of the Deputy or his staff, her assessment of the appropriate level of costs is broadly correct.

109. There is a raft of other potential Deputyship costs – appointment of a new Deputy, increased Deputyship activity due to an unforeseen crisis, additional applications to the Court of Protection, wills, cohabitation or prenuptial agreements. Some of these will be one-off costs and some are contingent upon a particular development in JR's life. The experts have taken the view that it would appropriate to amalgamate all of these costs into a single lump sum amount taking into account the variance in views as between the experts. I agree with that approach. The agreed sum is £38,160. It follows that I do not need to consider the details of these costs any further.

Approval of agreed items

110. I return to the matters summarised at paragraph 10 above which have been agreed. JR has been represented throughout by leading and junior counsel. I have been provided with a copy of the confidential advice which explains the basis of the agreement in relation to those matters. There is no doubt at all that it was wholly appropriate to agree the sums set out in that advice and as reflected in the final schedule attached to this judgment. I shall deal with each item albeit not in detail. It will be sufficient to identify the head of loss and to summarise the basis of recovery.

111. General damages in the sum of £300,000 is at the upper end of the relevant Judicial College guidelines for very severe brain damage. On the one hand it could be said that JR's ability to live a reasonable life is rather better than many in his position. That is something achieved in part due to the dedication of his parents. On the other hand he has a clear insight into the severe injury which he has suffered and his life expectancy is very substantial in comparison to many with this kind of injury. I have no doubt that £300,000 represents a proper reflection of pain, suffering and loss of amenity in his case.

112. The sum agreed to represent past losses covered a number of heads of damage. Those advising JR have taken a reasonable and reasoned approach to the right figure in relation to each head. For example:

- In relation to loss of earnings proper account had to be taken of the fact that, uninjured, JR would not have achieved a significant earning capacity until he was about the age he is now.

- The figure for past care had to take account of the gratuitous nature of the care until the recent involvement of salaried carers.

- In relation to therapy there needed to be some recognition as to the potential irrecoverability of the cost of some of therapy undertaken.

- Some claims could not succeed on a full cost basis because JR would have undertaken the relevant activity at some cost in any event e.g. holidays.

- The cost of a Audi Q3 car, a type of SUV vehicle, could not be attributed to JR's injuries.

113. The overall figure for past losses net of interest has been agreed at £747,147.29. I am satisfied that, for the reasons alluded to above, this agreement was appropriate and fully in the interests of the protected party.

114. The figure for interest on past losses using half the special account rate from the date of the accident i.e. the date of JR's birth was 59.4%. Significant parts of the claim related to losses suffered quite close to the date of trial. On that basis it was agreed that there should be some reduction in the conventional rate. That was a sensible approach. The agreed interest figure was just short of 50% on the overall figure as set out above.

115. In respect of future losses the agreed figure for occupational therapy represents the evidence of JR's own expert on the need for such therapy after the age of 30 with a marginal reduction for other risks of litigation. The agreed figures for speech therapy, podiatry and orthotics all represent a similar sum i.e. the figure justified by the expert instructed on behalf of JR with a modest discount for the risks of litigation. The claim for future loss also included a head identified simply as "miscellaneous". It covered such matters as the extra cost of washing powder and increased telephone costs. The agreed figure represents the mid-point between that claimed and that conceded in the counter schedule. Given the impossibility of a strict calculation of these items, such an agreement was appropriate.

Conclusion

116. The sum to be recovered is as set out in the accompanying schedule which has been agreed as accurate between the parties. Periodical payments will be utilised to cover care and case management costs.

JR
TABLE OF FIGURES POST TRIAL

HEAD OF LOSS	CLAIMANT	DEFENDANT	Amount to be recovered
	M: 55.06	**M: 52.94**	**post trial as a result of agreement or finding of the court**
General damages & interest	**TBQ**	**TBA**	**£300,000**
Past losses			
Loss of earnings	106,620.71	71,751	
Care & assistance	665,469.84	414,079	
Therapy	32,542.37	28,467	
Aids & equipment	75,876.96	75,877	
Accommodation	8,505.88	8,506	
Miscellaneous	105,737.70	40,728	
Travel and transport	73,168.45	17,300	
AT & camera equipment	21,932.58	12,000	
Court of Protection & Deputy	54,237.10	31,373	
Interest	660,260.24	140,016	
Total of past losses	**£1,771,809.46**	**£840,097**	**£1,112,338.00**
Future losses			
Loss of earnings & pension	1,305,102.10	880,368	£1,194,666.00
Care & assistance	16,449,485.50	14,182,527	£189,313
Equipment	2,334,562.83	717,927	£1,189,289

Physiotherapy	722,761.07 (this has been reduced by C to reflect agreed hourly rate & on D's calculation the total should be c. £610,211)	188,131.20	£501,277
Occupational therapy	125,010.60	44,702.80	£45,000
Speech & language therapy	56,121.60	43,172.56	£52,290
Podiatry	12,333.44	9,529.20	£11,000
Accommodation	2,867,030.06	540,917	£840,000
Travel & transport	2,030,419.83	715,458	£1,462,474
Miscellaneous expenses	100,481.60	81,659	£90,000
Orthotics	46,283.74	36,463	£41,500
Court of Protection & Deputy	1,448,740.10	541,212	£898,993
Total future losses	**£27,498,332.50**	**£17,982,067**	**£6,515,802**
Grand total	**£29,270,142**	**£18,822,164**	**£7,928,140**
PP for care and case management from 15.12.17 with first variation 15.12.17 linked to ASHE 6115 80th centile			**Annual PP: £293,117**