IN THE QUANTUM TRENCHES

LEO WHITEN v ST GEORGE'S HEALTHCARE NHS TRUST

1. Introduction

1.1 This case involved the assessment of damages for a child, Leo Whiten, who suffered profound hypoxic ischaemic damage during the course of his birth on 24th June 2004. This resulted in him being born with catastrophic disability in the form of mixed spastic-dystonic severe quadriplegic cerebral palsy.

1.2 In September 2005, breach of duty was admitted by the Defendant and, in March 2006, the Defendant further admitted that its breach of duty had caused the Claimant's injury. Proceedings were commenced on 8th August 2006 and, on 30th August 2006, judgment was entered for the Claimant. The assessment of damages hearing commenced on 30th November 2010.

1.3 The injury caused the Claimant, who was aged seven at the date when judgment was given, to suffer from a severe learning disability with functioning assessed at a level within the first two years of life. He also had severe physical disabilities. These included: (a) poor head control; (b) limited hand function; (c) very limited mobility (the precise extent of which was in dispute); (d) reduced vision and a squint. In addition, the Claimant was fed by others. He also suffered from mild epilepsy.

1.4 It was common ground that the Claimant would always be totally dependent on the care of others for all daily activities; that he would never be able to live independently; that he would not be capable of any form of employment; and that he would never have the necessary mental capacity to be able to manage his own affairs. The issues the Court was asked to decide included life expectation, the correct table to apply in calculating the multiplier, and the calculation of virtually all of the heads of loss including care, accommodation, equipment and other future losses.

1.5 Judgment was handed down by Mrs. Justice Swift on 8th August 2011[1]. The points of particular interest include: (a) the Claimant's condition, prognosis and life expectation; (b) the calculation of the multipliers; (c) loss of earnings award; (d) the award for future care; (e) the award for accommodation. A number of other awards are also considered below.

[1] [2011] EWHC 2066 (QB).

2. The Claimant, His Family & Background

2.1 The Claimant was born on 24 June 2004. He was seven years old when judgment was handed down.

2.2 The Claimant was the first child of Mr. Simon Whiten (who was aged 42 years) and Ms. Samantha Nowell (who was 33 years old).

2.3 At the time of his birth, his parents were living together in London, where they both had well paid employment.

2.3.1 Mr. Whiten had a second class Honours degree in Archaeology from University College, London. He had been the group commercial manager for the trade newspaper, "The Publican", earning about £60,000 per annum. He then worked for a digital publishing company that publishes cycling magazines and managing websites for a number of cycle retailers earning about £55,000 per annum. He was working from home at the time of the hearing. Mr Whiten's father was a civil engineer. His mother was a dental nurse. His brother was a consultant anaesthetist.

2.3.2 Ms. Nowell had an Honours degree in Information and Communications from Manchester University and a Master of Science degree in Information from Sunderland University. She had worked as a data analyst for an insurance company earning £75,000 per annum, then for a reinsurance company, then for Lloyds of London and another company with earnings equivalent to £122,000 per annum. Ms. Nowell's father was a nurse. Her mother had been a head teacher. Her brother was an engineer. Her sister, who was in her mid-twenties, was not working.

2.4 Following the Claimant's birth, the family had two other children: Dexter, who was born on 18th October 2007, and Victor, who was born on 11th March 2011. Dexter was said to be a bright boy who was doing well at nursery.

2.5 The family lived in London, but planned to move outside it when the Claimant attained the age of 11.

2.6 From the age of three the Claimant had attended school at Linden Lodge School in Wandsworth, south London.

3. The Claimant's Condition, Prognosis & Life Expectation[2]

3.1 The Claimant's physical disabilities were described by the judge as follows:

> "*By reason of the defendant's negligence, he suffered profound hypoxic ischaemic damage and developed a mixed spastic-dystonic severe quadriplegic cerebral palsy. He has hypertonia (stiffness) in all 4 limbs and hypotonia (floppiness) in his trunk. He has limited mobility, the precise extent of which I shall discuss later in this judgment. He cannot stand or walk unaided. His hand function is also very limited and his hands tend to be fisted with his elbows bent. He can open his fingers at times but a change of position, excitement or discomfort can cause his hands to fist again, making any further voluntary movement impossible. He suffers from mild epilepsy which is controlled by medication. However, he experiences frequent involuntary dystonic spasms and is prone to strong extensor spasms, particularly when startled. He has poor head control with a strong asymmetric tonic neck reflex to the right which causes him to look to the right and makes it difficult for him to bring his head into the mid-line. His eyes deviate to the right and he has reduced vision in his left eye and an intermittent convergent squint. He can vocalise but has no functional speech. He is doubly incontinent. His general health is good although he has suffered a number of chest infections in the past. Despite his profound disabilities, it is clear that he is a very engaging and generally happy child who is socially aware and thoroughly enjoys the company and attention of adults and other children.*"[3]

In addition the Claimant had various orthopaedic problems including: (a) increased spasticity of the arms which would require botulinum toxin injections, and potentially surgery to relieve contractures; and (b) progressive subluxation of the right hip which would require botulinum toxin injections, soft tissue and potentially bone surgery. Surgery to the spine (if fixed scoliosis developed) and/or to lengthen the Achilles tendons might also be required.

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[2] Paragraph 8 onwards.
[3] Paragraph 9.

3.2 The Claimant's cognitive disabilities were described by the judge as follows:

> *"The experts agree that the claimant has significantly impaired cognitive function resulting in a severe degree of learning disability ... Because of those problems [lack of ability to communicate and physical disabilities], they were unable to undertake a formal psychometric assessment. In particular, they had difficulty in assessing his precise level of understanding of language. It was clear that he understands certain key words although his reactions to the words were slow, suggesting a delay in information processing and speed of response ... Overall, the educational psychologists agreed that, even taking into account the claimant's physical and visual impairments, he was functioning only at a cognitive level equivalent to a normal child in the first two years of life. Their view was that, if the claimant continues to make progress — in particular with his communication skills — he can be expected, when he reaches adulthood, to have attained a level of cognitive functioning equivalent to a child of 4–5 years."*[4]

As to whether this progress would be made the judge preferred the evidence of Dr. Jane Hood, the Defendant's educational psychologist, which was to the effect that the Claimant's reasoning and functioning level was likely to remain well below the level of a four to five year old.

3.3 The Claimant's life expectancy was heavily disputed.

3.3.1 The position of the parties' experts was as follows. Dr. Richard Miles considered that he would probably live to the age of 44 years. Dr. Neil Thomas predicted a life expectancy to the age of 35 years.

3.3.2 Dr. Miles relied upon the 2008 Strauss adult paper as follows:

(a) Dr. Miles stated that if the Claimant was aged 15 he would be halfway between the category of a child who could lift his head/fed by others and a child who could roll/fed by others.

(b) On this basis the Claimant had a life expectation using the US figures of between 20 and 32 further years from age 15, that is to between the age of 35 and 47. Dr. Miles adopted the mid-point of 41.

[4] Paragraph 13.

(c) Dr. Miles reduced the figure of 41 by two years to 39 for the chance that the Claimant would not live to the age of 15 years.

(d) Dr. Miles then added five years - adjusting the US historic by the UK projected figures - giving the Claimant a life expectation of 44 years.

3.3.3 Dr. Thomas used both the 1998 Strauss child paper and the 2008 Strauss adult papers as follows:

(a) Dr. Thomas assessed the Claimant as being able to lift his head when lying on his stomach, but not as being able to lift both his head and chest and as not being able to roll.

(b) Using the 1998 Strauss child paper:

(i) Dr Thomas considered that if the Claimant had been aged three and a half, he would have had a life expectancy of a further 20 years from the age of three and a half.

(ii) Dr Thomas conceded in oral evidence that this assessment was incorrect in that the 2007 Strauss paper - *Survival in cerebral palsy in the last 20 years: signs of improvement*? - required him to add a further five years to the 20 years giving a life expectation of a further 25 years from the age of three and a half.

(c) Then Dr. Thomas considered what the Claimant's life expectancy would have been had he been aged 15. Using the 2008 Strauss adult paper he considered that if he lived to the age of 15 the Claimant would have a further life expectation of 20 years to the age of 35.

(d) Dr. Thomas considered that because the Claimant (who was aged six and a half when assessed) fell between the age of three and a half years and 15 years, his life expectation should be between the further 25 years from the age of three and a half (see (b) above) and the further 20 years

from the age 15 (see (c) above), that is should be a further 24 years to the age of 30 to 31.

(c) Dr. Thomas then added four and a half years for the adjustment between US and UK figures. This resulted in a life expectation to age 35 years.

3.3.4 Swift J heard factual evidence about the Claimant's abilities from the Claimant's parents, a carer, a treating physiotherapist, and both experts. She also reviewed the medical and other records. She made the following findings: "*I find that the claimant is able to roll through 90 degrees in each direction, although he does not do so consistently*"[5]; "*I accept that the claimant can lift his head when lying on his stomach, whether or not he is supported by a cushion under his upper chest. However, I do not consider that there is convincing evidence that he can lift both his head and his chest independently when lying on his stomach.*"[6]; "*I also find that there is a small risk that, at some time in the future, it may be necessary for the claimant to be tube fed, at least in part.*"[7].

3.3.5 Further, Swift J was troubled by the expert evidence stating that she found it difficult *"to repose a great deal of confidence in the evidence of either expert"*. Dr. Thomas was criticised for his late acknowledgment of the five year uplift in the 2007 Strauss paper. Dr. Miles was criticised for claiming that Dr. Rosenbloom had approved his methodology when this was found not to have been the case. Despite the criticism of Dr. Thomas, Swift J found that it was appropriate to adopt the method used by him, that is to consider the number of additional years of life expectation of a child of three and a half years and also of a child aged 15, and use both when assessing the Claimant's expectation of life. She therefore found that the Claimant would live a further 24 years from the age of seven, that is to the age of 31. She made a further adjustment to take account of US historic/UK projected estimates, and increased the figure to the age of 35[8].

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[5] Paragraph 79.
[6] Paragraph 80.
[7] Paragraph 81.
[8] Using the methodology set out at p491 of the 2008 Strauss adult paper.

3.3.6 Of interest are the following matters:

(a) The need for a close analysis and understanding of the Strauss' literature[9] and its limitations.

(b) The need for a close and objective factual and expert analysis of a claimant's current and prospective condition and abilities, in particular usually his or her head lifting, rolling and feeding abilities.

(c) The method to be adopted when a child is aged between three and a half years and 15 years.

3.3.7 In relation to the Strauss literature, it is important to have a complete understanding of this when obtaining evidence of a claimant's capabilities and when instructing the life expectancy expert:

(a) The 1998 Strauss paediatric paper. This involved a cohort of children who were aged between 6 months and 3½ years at the time of entry into the study. The following points should be noted:

(i) The children were divided into: those who could not lift their heads when lying on their stomachs; those who could lift their heads, but not their chests, when lying on their stomachs; those classified as "*lifts head and chest, partial rolling*"; and those classified as "*full rolling, does not walk unaided*". Highest on the scale of mobility skills were those who could walk 10 feet unaided. Each of the four mobility classifications was further

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[9] That is:

(a) *Life expectancy of children with cerebral palsy.* Pediatric Neurology 1998;18:143–149 (the 1998 Strauss paediatric paper);
(b) *Life expectancy of adults with cerebral palsy.* Developmental Medicine and Child Neurology 1998;40:369–375 (the 1998 Strauss adult paper);
(c) *Survival in cerebral palsy in the last 20 years: signs of improvement?* Developmental Medicine and Child Neurology 2007;49:86–92 (the 2007 Strauss paper); and
(d) *Life expectancy in cerebral palsy: an update.* Developmental Medicine and Child Neurology 2008; 50: 487–493 (the 2008 Strauss paper).

sub-divided into: "*tube fed*", "*fed by others*" and "*some self-feeding*".

(ii) There are important limitations to this study:

- The first is the age of the children within the cohort (and, therefore, whether it can be said that a one year old's experience can realistically shed light on a child aged, say, 10).
- The second is the fact that "*rolling*" ability is not defined other than the paper refers to both "*partial rolling*" and "*Full rolling*"[10]. The answer to this is to be found in the Strauss created "Patient Evaluation Questionnaire". This includes "*Rolls from side to side [must be 180 degrees, or fully to each side]*", "*Rolls from front to back only*" and "*Rolls from front to back and back to front*".
- The third is the fact that "*some self feeding skills*" is not defined except to say that "*For the feeding variable, the referent group consists of those with at least some self-feeding ability, if only with fingers.*"[11].
- The fourth is the fact that whilst the paper provides the additional number of years for two groups (those unable to lift their heads and those who were able to lift their heads, but not their chests, when lying on their stomachs - see the graphs in Figures 1 and 2), it does not provide the additional number of years for those with greater mobility (in particular Table 3 only provides the statistical probability of survival for an additional 5, 10 and 15 years for a six month to three and a half year old, not the additional number of years survival). For those with rolling ability, the only solution is therefore to use the 2008 Strauss paper.

[10] Table 3, p148.
[11] Second paragraph, p146.

(b) The 1998 Strauss adult paper. This involved a cohort aged 15 or above. The participants were divided into those who "*cannot lift head*", "*lifts head*" and "*rolls/sits*". These classifications were sub-divided "*tube fed*", "*fed by others*" and "*some self-feeding*". Whilst there may be evidential issues about whether a claimant can consistently lift his or her head or will remain fed by others or will remain tube-fed, the rolling and self-feeding categories need careful consideration. It is noteworthy that the classification "*rolls/sits*" includes "*At least partial rolling*"[12].

(c) The 2007 Strauss paper. This increased the life expectancy estimate for the tube-fed children by five years.

(d) The 2008 Strauss adult paper. This revised and updated the 1998 Strauss adult paper. It also sub-divided the "*rolls/sits*" classification into "*rolls/sits, cannot walk*" and "*walks unaided*". Importantly, the self-feeding classification used in the 1998 papers is also discussed: "*In the database we worked with there is a six level feeding scale, ranging from fed by others (level 1) to finger feeding (levels 2 and 3) up to 'uses fork and spoon without spillage' (level 6). We used the phrase 'at least some self-feeding (SF)' in the earlier articles simply to contrast levels 2 to 6 with level 1. To qualify for this the person must take a significant proportion of his nutrition by SF. We perhaps did not make it sufficiently clear that children who take only 10%, say, of their nutrition by SF would not be considered to have at least some SF for our purposes.*"[13]

3.3.8 In terms of the need for a close and objective factual and expert analysis of a claimant's current and prospective condition and abilities, as always the evidence of the family (and care team) must be supplemented by evidence which the judge will accept as objective, for instance that of treating clinicians, therapists, respite carers and teachers, the documentary evidence and DVD recordings.

[12] Table 1, p371; last paragraph, second column, p372.
[13] Point 7, col.1, p489.

3.3.9 In relation to the correct method to be adopted when a child is over the age of three and a half and under the age of 15, it cannot be right to use the 1998 Strauss child paper and the 2008 Strauss adult papers. Instead the objective should be to ascertain the chance that the child will live to the age of 15 and will not live to that age, and then apply those chances to the periods to and from the age of 15. By way of example, if a child aged seven has an 80% chance of living to the age of 15, and is likely to live a further 20 years to the age of 35 if he does so, then the fairest way of assessing his life expectancy is as follows: (80% x 35 = 28) + (20% x 11, that is the years to age 11 being the mid-point of 7 – 15 = 2.2) = to age 30.2 years. A statistician or Professor Strauss may have to be instructed to assist.

4. The Form of Award & Multiplier[14]

4.1 The Form of Award.

A periodical payments order was ordered by Swift J. The periodical payments component of the award included, conventionally, the damages for future care and case management ordered to be up-rated by the 90th centile of the ASHE SOC 6115. In addition, it included the award for loss of earnings up-rated annually by reference to the ASHE earnings data for the gross annual pay for all male full-time employees in the United Kingdom (currently Table 1.7a).

4.2 The Multiplier.

4.2.1 Swift J reviewed all of the cases relating to the use of Ogden table 28 multipliers since *B v RVI and Associated Hospitals NHS Trusts*[15] and rejected the use of the method contained in paragraph 20 of the Explanatory Notes to the Ogden Tables. Similar arguments were raised by the defendant in *B v RVI* which were rejected by

[14] Paragraphs 6 and 86.

[15] [2002] Lloyd's Rep. (Med.) 282. See: *Waseem Sarwar v Kamran Ali and Motor Insurers' Bureau* [2007] EWHC 274 (QB); *Tinsley v Sarkar* [2006] PIQR Q1; *Anthony Burton v Guy Francis Kingsbury* [2007] EWHC 2091 (QB); *Anthony Peter Crofts v Alan Murton* [2009] EWHC 353 (QB); and *Smith v LC Window Fashions Ltd* [2009] EWHC 1532 (QB).

the Court of Appeal. Swift J therefore confirmed that Ogden table 28 should be used[16].

4.2.2 It is not clear whether an order was made permitting the Claimant to return to Court in the event that the discount rate is adjusted[17]. It is assumed that it was in the (now) conventional way.

5. The Award for Loss of Earnings[18]

5.1 The Claimant contended for a loss of earnings of £75,000 gross or £50,561 net per annum from the age 21. The Defendant argued that an annual salary of £35,000 gross or £26,074 starting at age 22½ was appropriate.

5.2 Swift J found that the Claimant's family background suggested that:

> "*the claimant would probably have been motivated to seek and obtain employment and would have had the abilities and qualifications to find and retain a good job in the public or private sector. I consider that it is probable that, at the peak of his career, he would have earned significantly more than the average earnings for all types of employment.*"

5.3 The judge also found that:

(a) The Claimant's career would have commenced at the age of 22½.

(b) The Claimant's average annual earnings— even taking into account the probable lower than average remuneration during the early years — would have exceeded current average male earnings.

(c) The deduction for contingencies other than mortality "*Given the short period of the claimant's notional working life and the other circumstances of the case, I consider that the discount should be modest, namely 5% of the annual figure.*"

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[16] Paragraphs 89-105.
[17] Paragraph 86.
[18] Paragraph 113 onwards, in particular 120 onwards.

5.4 The judge concluded that the Clamant would have earned an average figure of £45,000 per annum gross, or £32,861 per annum net which she reduced by 5% to £31,218 (reducing the multiplicand not the multiplier because of the periodical payment order) and by £218 (for some employment related expenses).

6. The Award for Future Care & Case Management[19]

6.1 The Claimant adduced the evidence of Ms. Maggie Sargent. The Defendant called Ms. Jo Douglas. The fact that the latter did "*not undertake case management herself, nor does she have experience of managing and supervising personally care regimes for individuals with complex disabilities in a domestic setting*" led the judge to find that "*she was less able than Ms. Sargent to speak with authority on some aspects of the care claim*".

6.2 Past Care[20].

6.2.1 Gratuitous Care. There were differences in the parties' valuations of this claim as to the number of hours of additional care required and given (the judge preferred Ms. Sargent's assessment less the paid care received); the rates of pay (the judge preferred the aggregate NJC rates favoured by Ms. Sargent); and the gratuitous care discount (the judge chose a 25% discount in response to the Claimant's case that there should be no deduction, and the Defendant's case that a 30% discount was appropriate).

6.2.2 Paid Care. The cost of this was agreed. The cost of childcare which would have been required in any event was not agreed. The Claimant contended that the cost of a private nursery of £11,500 per annum would have been incurred until he went to school. The Defendant argued that a full-time non-resident nanny would have been employed at an annual cost of £25,559. The judge preferred the Claimant's case. But, she also made a further deduction for childcare costs after this time of £7,500 per annum.

[19] Paragraph 127 onwards.
[20] Paragraph 146 onwards.

6.3 Future Care[21].

6.3.1 The general framework of the regime was agreed with steps from trial to the age of 11, from age 11 to 19 and from age 19 for life. There were differences, however, as to the amount of care and, post-19, whether it should be provided by an employed or agency regime.

(a) To age 11. The experts agreed that six hours of paid care was required during school weekdays. They also agreed that sleep-in care was required at £65 and £75 per weekday and weekend night. The experts disagreed as to the amount of care during the weekends and school holidays. Ms. Sargent recommended 12 hours' paid care per day. Ms. Douglas recommended seven hours per day at weekends and nine hours per day during school holidays. The judge found that the family were caring for the Claimant on their own on Sundays and were likely to continue to want to provide him with some care and spend time with him without the intrusion of a carer. She awarded 10 hours care per day at weekends, but 12 hours per day during the school holidays. The experts also disagreed as to the amount of second carer time required. Ms. Sargent estimated the additional costs on the basis that there would be 3 such occasions per week. Ms. Douglas cast doubt on this amount. The judge awarded 2 hours' assistance for one swimming session per week during term time and a total of 4 hours' assistance for 2 sessions per week during school holidays. Overall the judge made an award of £94,982 per annum.

(b) From age 11 to the age of 19. Ms. Sargent estimated the annual cost at £141,976. Ms Douglas' estimate was £121,794 per annum. The amount of weekend care remained in dispute. The judge increased the weekend care from 10 to 12 hours each day (Ms. Douglas has recommended only nine hours per day). The amount of second carer time also remained in

[21] Paragraph 156 onwards.

dispute. Ms. Sargent considered that a second carer would be required for five hours per day in term time and eight hours per day at weekends and during school holidays. Ms. Douglas recommended four hours on school days, and six hours at weekends and during school holidays with the Claimant's parents assisting at other times. The judge awarded four hours per day on school days, but eight hours at weekends and during school holidays. Overall the judge awarded the annual sum of £137,240.

(c) From the age of 19 years. Ms. Sargent costed the regime in the sum of £224,245. Ms. Douglas' estimate was £194,644 per annum. The former recommended a directly employed team of carers with two carers for 14 hours per day, together with a night sleeper for 10 hours per night. The latter recommended that there should be an agency live-in carer working in conjunction with directly employed carers (including a sleep-in carer) working shifts. The live-in carer would work for eight hours during the day and would be entitled to 3 hours' rest within that 8-hour period. Other carers would provide 10 hours' care per day during the week and 12 hours per day at weekends, together with sleep-in care every night. The judge rejected Ms. Douglas' approach stating that "*On this issue I have no hesitation in preferring the evidence of Mrs Sargent to that of Ms Douglas. No doubt there are cases in which Ms Douglas's proposed care model works well. However, it is entirely dependent on the calibre and commitment of the individual whom the relevant agency is able to provide at any given time. There is an obvious potential for rapid turnover of live-in staff and for difficulties in ensuring that any replacement/relief staff provided by the agency — perhaps at short notice — are fully and properly trained in the claimant's needs. There is also a potential for confusion of management responsibilities between the case manager and the agency, and for conflict to be caused by an arrangement whereby live-in carers are working alongside higher paid, directly employed staff. Moreover, Ms Douglas's proposed regime would inevitably leave the claimant for 3 hours every day without a second carer. That would not be in his best interests.*" The judge also accepted Ms. Sargent's annual costs of care in the sum of £221,998.

6.3.2 The annual costs awarded (as stated above) included a number of disputed items:

(a) The employment of a team leader. The judge found that one was necessary and that "*Ms Douglas's suggestion that the necessary co-ordination and other functions should be undertaken by the case manager is, I consider, unrealistic*". She also accepted that this should be for 30 hours per week at £16 per hour.

(b) The approach to calculating the allowance to be made for replacement care to cover carers' holidays (including bank holidays), sickness and training periods. Both experts added eight weeks to the 52 week year, but Ms. Sargent, whose approach the judge accepted, costed them by reference to weekday, weekend and night rates whereas Ms. Douglas costed them by reference only to the basic weekday rate.

(c) The various additional costs (over and above carers' salaries) associated with the employment of carers. The judge stated that "*The experts agree the costs of advertising for staff (at £1,000 per annum for the first two care periods, rising to £1,500 for the third care period) and insurance (£134 per annum for all three care periods). They also agree the cost of training carers at £1,000 per annum for the second and third care periods. However, there are differences between them in relation to (i) the cost of food and other expenses for all three care periods; (ii) the cost of training for the first care period; and (iii) the cost of payroll services, i.e. the cost of employing an individual or company to compute and document the salaries, tax, national insurance and other payments to be paid to or for the claimant's carers.*" In relation to (i), the judge preferred Ms. Sargent's estimates of £2,080 per annum for the first period of care (as opposed to £1,820), £3,280 per annum for the second period (£2,340) and £4,680 per annum for the third period (£3,640). In relation to (ii) and (iii), the judge preferred Ms. Douglas' cost of £750 (as opposed to £1,000) per annum, and made no payroll award.

(d) The incidence of employers' pension contributions for carers in the future pursuant to the *Pensions Act 2008*. The judge made no award for potential contributions during the first care period given that it was unlikely that contributions would have to be made prior to 2016. Thereafter she reduced the contributions to reflect various chances – initial level of the contribution; the likely fact that not all carers would be included – so that Ms. Sargent's figure of £2,625 per annum for the second period was reduced to £1,500; and her figure of £4,446 reduced to £3,000.

(e) The costs of childcare for the claimant after school and during the school holidays offset from future care costs to the age of 16. The judge made no deduction because childcare would have to be purchased in any event after the Claimant's brother, Dexter, started school (in December 2011).

6.3.3 Case Management[22]. The judge found that Ms. Sargent's estimate of 120 hours per annum at an annual cost of £11,600 was fair and reasonable to the age of 11; that 130 hours per annum at an annual cost of £12,600 was necessary from the age of 11 to 19 (Ms. Sargent: £13,600 after the first year; Ms. Douglas: £10,590); that £13,600 was appropriate after the age of 19 with an uplift for the first year (in line with Ms. Sargent's recommendation).

6.3.4 Indemnity[23]. There was a possibility that the Claimant would board at Linden Lodge at some future time thereby reducing the cost of the care regime. The Defendant indicated that it would seek an indemnity from the Claimant to cater for this possibility. The judge was receptive to this although it is not clear whether an indemnity was included in the final order.

[22] Paragraph 208 in particular 216 onwards.
[23] Paragraph 207.

7. The Claim for Aquatic Physiotherapy[24]

The judge rejected this claim – for a home hydrotherapy pool and for aquatic therapy outside the home - stating that:

> *"The claimant already has weekly aquatic physiotherapy sessions during the school term. There appears no reason to believe that these sessions will not continue until he leaves school. The only evidence in support of a clinical need for any additional provision of aquatic physiotherapy comes from Mrs Filson. She suggests it as only one aspect of the activities to be undertaken in the course of the claimant's general physiotherapy provision. Her evidence does not support the extensive claim for aquatic physiotherapy contained in the Schedule of Loss. I have no doubt that the claimant enjoys his aquatic physiotherapy sessions, just as he enjoys his visits to the swimming pool with his family and/or carers. I readily accept that exercising in water is generally beneficial for him. However, I am not satisfied that the claimant has established a clinical need which cannot adequately be met by physiotherapy exercises carried out in an ordinary swimming pool with suitably trained carers and, occasionally, his treating physiotherapist. Consequently, I make no award for the costs of future aquatic physiotherapy. Whilst it might be convenient for the claimant to have a pool at his new home, there is no evidence of a real need for that facility. The claimant will have trained carers and a suitably adapted vehicle to take him for sessions in a swimming pool at a local private leisure club whenever he wishes to go. The availability of suitable pool facilities will be one factor to be considered when the family come to decide where their new home should be sited."*

The judge did however allow for some of the cost of membership of a private club with a pool: "*For the reasons I gave when rejecting the claim for the past costs of membership of the Virgin Active club, I decline to make an award for the future costs of club membership whilst the claimant is in full-time education. After that time, however, it seems to me less likely that he would have had membership of a private leisure club, at least for some years. I am satisfied that, from the age of 19 years, it would be appropriate to award an annual sum to cover membership of the Virgin Active club or a comparable facility for the claimant and his carers. I intend to adopt the defendant's proposal of awarding an annual sum to cover the additional cost attributable to the claimant's disabilities of accessing suitable leisure facilities (including a swimming pool) and of funding any necessary training for carers. I consider that this annual allowance will be required throughout his lifetime. When considering the annual sum that would be appropriate, I have taken into account*

[24] Paragraphs 257 onwards in particular 262-263, 268.

various factors, including the fact that the need for additional facilities will decrease towards the end of the claimant's life and that, from his late twenties, he might well have had membership of a private leisure facility in any event. I conclude that a fair award under this head is £1,000 per annum until the claimant attains the age of 19 years and £1,500 per annum thereafter."

8. The Award for Aids & Equipment[25]

8.1 Swift J's analysis of the wheelchair provision to the Claimant is of interest. This is often the most expensive equipment claim, and is the greatest difference between the parties.

8.2 The Claimant's expert, Ms. Jenkins, recommended the Sunrise Medical Groove powered wheelchair at a cost of £9,020 when the Claimant reached the age of 10. This was an easily manoeuvrable wheelchair with a particularly smooth ride equipped with a seat which could be raised and lowered and tilted "in space". It was also very stable due to power being transmitted to each of its wheels.

8.3 The Defendant's expert, Ms. Page, recommended that at about the age of 11 the Claimant would need a Spectra XT wheelchair at a cost of £3,500 which could be equipped with high/low and tilt facilities at an additional cost of about £2,500, but which she did not consider were necessary. She considered that the Groove was too large and powerful for the Claimant's needs.

8.4 The means by which each wheelchair could be controlled was explored in detail. It was agreed that the Claimant would never be able to control a conventional powered wheelchair fully and independently in the community. It was thought that at best he might acquire the ability to do so for short periods or in a protected environment using either My Tobii eye gaze technology or SMART controls. It was found that the Groove (unlike the Spectra) was not compatible with either eye gaze technology or SMART controls, and therefore could not be controlled by the Claimant (assuming he developed the ability to do so). The Defendant, on the other hand, did not concede

[25] Paragraph 318 onwards in particular 331 onwards.

that the Spectra should be equipped with the means by which the Claimant could control it.

8.5 In awarding the £9,020 cost of the Groove from the age of 11 1/2 to the age of 25, the judge took into account the fact that she was also making an award for a SMART chair from that age (to the age of 25), and that:

> *"At that time, he will not need SMART controls or eye gaze facilities on his powered wheelchair. However, in my view he will need high/low and tilt facilities. The high/low facility will be of obvious benefit to him on occasion in order to bring his eye level to or nearer to the level of people standing around him, or to enable him to get a better view of something which is of interest to him. The tilt facility will enable his carers easily to change his position within the wheelchair in order to relieve discomfort of any sort. If the choice of wheelchair model were to be made now, it would be between the Groove at £9,020 and the Spectra (with the additional facilities) at about £6,000. The fact that the Groove gives a smoother ride is of considerable importance to the claimant's comfort, particularly in the event that he is suffering from pain in his hip or elsewhere. Therefore I have no doubt that the Groove would better meet his requirements at this stage."*[26]

After the age of 25 when the Claimant would no longer have a SMART chair, the judge awarded the £11,500 cost of the Spectra with high/low and tilt facilities and with SMART controls.

9. The Award for Accommodation[27]

9.1 By way of background, prior to the hearing and due to cramped conditions the family moved as a matter of urgency from a maisonette, 99 Lucien Road, valued at £244,000 (with a mortgage of £240,000) to a property at 192 Crowborough Road which cost £400,000 (with a mortgage of £360,000).

9.2 It was agreed that in its original condition 192 Crowborough Road was not suitable for the Claimant's needs. It was also agreed that it could never be adapted to make it suitable. During the course of the case both of the parties' accommodation experts, Mr. Wethers and Mr. Cowan, recommended that it would be better if an alternative

[26] Paragraph 355.
[27] Paragraph 367.

property was purchased and adapted. For various reasons, the family wished to stay in London at least for some years. An interim payment confined to the cost of adapting 192 Crowborough Road was obtained. The property was adapted for a total cost of £385,000.

9.3 Although the judge expressed considerable dissatisfaction with the course of events, she found that the move from 99 Lucien Road was required because of the Claimant's disabilities, but that a move to a property similar to 192 Crowborough Road would have occurred in any event in time given the birth of the other children (and accordingly did not allow the cost of the move). She also found that it was reasonable to remain within the borough (given the medical and other support systems in place), and that it was reasonable for the family to have purchased 192 Crowborough Road without specialist advice given the pressures they were under. She also found that, contrary to Mr. Whiten's evidence, the family knew that the adaptations would never make the property suitable in the long-term for the Claimant; and that the costs of adapting two properties would therefore inevitably be incurred. In spite of this finding and despite expressing "*considerable sympathy with the defendant's position*", the judge awarded £321,838 of the £385,000 adaptation costs less a sum for betterment of £80,000 and a disabled facilities grant in the sum of £30,000. She did so because the family would not have been awarded an interim payment to purchase a sufficiently large long-term home given the Court of Appeal's decision in *Cobham Hire Services Limited v Eeles*[28]. Apart from the adaptation costs, the judge made a *Roberts v Johnstone* award based upon the betterment sum and the agreed additional running expenses. The judge did not allow the family's mortgage costs.

9.4 In respect of the future property, the judge decided that given that it was to be purchased in the Claimant's name, the full *Roberts v Johnstone* cost should be awarded without deduction for the family's uninjured accommodation cost[29], but with a deduction of £125,000 from the age of about 25 (when the Claimant would have bought a starter home on his own or a larger home with a partner). In addition the judge awarded £334,683 for adaptation of the property less a sum of £70,000 for its

[28] [2009] EWCA Civ 204.
[29] Paragraph 465, and following *M (a child) v Leeds Health Authority* [2002] PIQR Q46, and *Iqbal v Whipps Cross Hospital NHS Trust* [2007] LSMed 97.

consequent betterment. In doing so, the judge preferred Mr. Wether's estimate of the size of property which would be required (250 square metres) as opposed to Mr. Cowan's (185 to 200 square metres). She did not allow a seven square metre carers' office, and reduced the cost of a number of other small items. She also did not allow relocation costs because she found that the family would have moved in any event. The judge also awarded what were described as agreed additional running costs without expressing a view as to whether all (as opposed to the additional) running costs should be awarded to the Claimant's twenty fifth birthday.

1 Crown Office Row
Temple, London

Henry Witcomb
21st November 2011

Appendix I

Expert Evidence

Field	Claimant	Defendant
Paediatric neurology	Dr. Richard Miles	Dr. Neil Thomas
Educational psychologist	Mr. Anthony Baldwin	Dr. Jane Hood
Orthopaedic	Mr. Mark Paterson	-
Care	Ms. Maggie Sargent	Ms. Joanna Douglas
Physiotherapy	Ms. Susan Filson	Ms. Sandra Holt
SALT	Ms. Hazel Ellis	Ms. Lesley Carroll-Few
OT	Ms. Rachel Jenkins	Ms. Sabine Page
Orthotics	Mr. Walmsley	
Accommodation	Mr. Tom Wethers	Mr. David Cowan