

# SUPREME COURT OF QUEENSLAND

CITATION: *Hills v State of Queensland* [2006] QSC 244

PARTIES: **CHRISTOPHER HILLS**  
(plaintiff)  
v  
**STATE OF QUEENSLAND**  
(defendant)

FILE NO/S: BS 5440 of 2002

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 4 September 2006

DELIVERED AT: Brisbane

HEARING DATE: 18-21, 24, 26-28 April and 2-5, 8, 11-12 May 2006

JUDGE: McMurdo J

ORDER: **Judgment for the plaintiff in the sum of \$5,502,793.**

CATCHWORDS: DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – where the plaintiff’s birth involved an emergency caesarean in the circumstance of a foetal cardiac arrest – where the plaintiff suffered brain damage resulting in a type of cerebral palsy known as choreo-athetoid – where the plaintiff claims damages for negligence against the State of Queensland – where the State of Queensland has admitted negligence – where the plaintiff was later diagnosed with Type 1 diabetes mellitus – where differing expert evidence on probable lifespan of plaintiff – where assessment of probable lifespan of plaintiff relevant to measure of damages

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – MEDICAL AND HOSPITAL EXPENSES – where the plaintiff is entirely dependent upon the assistance of others for every day activities – where the plaintiff requires the attendance of carers on a twenty-four hour basis – where the cost of care varies according to the length of the carer’s shift – whether appropriate for carers to work 8, 12 or 24 hour shift arrangements – whether market cost of care appropriate for past and future gratuitous care and past and future paid care – whether the cost of future care should be discounted for

contingencies – whether the plaintiff’s claim for expenses and maintenance of future therapeutic aids, appliances and equipment appropriate and reasonable – whether plaintiff entitled to costs arising from future medical treatment, paramedical treatment and pharmaceutical costs

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – PROSPECTIVE EARNING CAPACITY OF YOUNG CHILD – where the plaintiff has no earning capacity as a result of cerebral palsy – where calculations were performed on three alternative levels of income including solicitors, human resources managers and average weekly earnings – whether assessment of earnings should be based on the weekly earnings of solicitors, human resources managers or average weekly earnings – whether the plaintiff is entitled to an allowance for long service leave – whether the plaintiff is entitled to an allowance for superannuation

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – OTHER PECUNIARY DAMAGE – whether plaintiff entitled to costs of house modifications for the parental home and the additional capital cost of modifying a house when the plaintiff lives independently from his parents – whether plaintiff entitled to costs of building and maintaining a hydrotherapy pool or the costs of using a public hydrotherapy pool facility – whether plaintiff entitled to maintenance costs of his parents house and maintenance costs in his own house – whether plaintiff entitled to costs of house cleaning and housekeeping – whether plaintiff entitled to costs of technological aids and training in the use of technological aids – whether plaintiff entitled to additional educational costs – whether plaintiff entitled to additional motor vehicle capital costs and standard running costs – whether plaintiff entitled to additional holiday costs – whether plaintiff entitled to a case manager – whether plaintiff entitled to out-of-pocket expenses and interest on out-of-pocket expenses – whether the public trustee or a funds manager should be appointed

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL DAMAGES – NON-PECUNIARY DAMAGE – PAIN AND SUFFERING – LOSS OF AMENITIES OR CAPACITY FOR ENJOYMENT – LOSS OF EXPECTATION OF LIFE – whether the plaintiff’s claim for general damages and interest on general damages is appropriate and reasonable

*Income Tax Assessment Act 1936* (Cth), s 159P  
*Public Trustee Act 1978* (Qld), s 59, s 59(1), s 59(4)  
*Supreme Court Act 1995* (Qld), s 16(1)  
*Trustee Companies Act 1968* (Qld).

*Castro v Hillery & Ors* [2001] QSC 510, discussed  
*Goode v Thompson* [2001] QSC 287, discussed  
*McChesney v Singh & Ors* [2003] QCA 498, distinguished  
*Mott v Fire and All Risks Insurance Co Ltd* [2000] 2 Qd R 34, discussed  
*Simpson v Diamond* [2001] NSWSC 925, cited  
*Theden v Nominal Defendant* [2004] QSC 310, discussed  
*Van Gervan v Fenton* (1992) 175 CLR 327, applied  
*Winterton v Mercantile Mutual Insurance* [2000] QCA 249, discussed  
*Willett v Fletcher* [2005] HCA 47, applied

COUNSEL: L A Levy SC, with M E Eliadis, for the plaintiff  
S C Williams QC, with J P Kimmins, for the defendant

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## **McMURDO J:**

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- [1] The plaintiff, Christopher Hills, is a boy born at the Toowoomba Base Hospital on 6 June 1996. His birth involved an emergency caesarean section in the circumstance of a foetal cardiac arrest. He suffered brain damage and in consequence he has and will always have a type of cerebral palsy, described as choreo-athetoid.
- [2] He claims damages for negligence against the State of Queensland, which operated the hospital and employed the relevant staff. The State admits negligence in relation to Christopher's birth, for which it is legally responsible and which is the cause of Christopher's cerebral palsy. The issues for determination concern the assessment of damages.
- [3] There is no substantial dispute as to Christopher's medical condition and the nature and extent of his disabilities. Cerebral palsy is a chronic disability of the central nervous system characterised by aberrant control of movement or posture. In Christopher's case, this results from damage to an area of the brain, the basal ganglia, which is responsible for co-ordination of muscle movements. His disabilities result from impaired motor functions. Christopher has no intellectual disability. His IQ has been measured in the average to above-average range.
- [4] He is unable to stand or sit unsupported. At present, he is able to walk a short distance with the use of a device called a Mulholland walker. He is able to crawl on his back and to roll over. He has poor fine motor hand skills and is unable to reach and grasp an object. He has no functional hand use. Consequently he cannot feed himself. He can chew and swallow food, although there is a question as to how long it takes him to finish a meal. The defendant does not accept that he takes as much time in finishing a meal as his parents estimate (an issue said to be relevant to the cost of care). He is able to use a computer by using a switch which he operates by moving his head.
- [5] He has no impairment in his vision or hearing. But he is severely impaired in his speech. His words are mostly unintelligible except for those whose ear has become accustomed to his speech. So his parents are able to understand most of what he says. Christopher gave evidence at this trial with the assistance of his father as a translator. He then impressed me, as he has many others, as a bright outgoing child. His linguistic skills are described by a speech pathologist as at least "reasonable in the context of his limited opportunities to verbally communicate"<sup>1</sup> and his

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<sup>1</sup> Ms Briker-Bell report 15 March 2004, p 12

vocabulary is described as sophisticated for his age. There is no issue that his award should include an allowance for the cost of appropriate communication aids, the detail of which I will discuss, but there is a contest as to what is reasonably required.

- [6] Not long before his fifth birthday, Christopher was diagnosed with Type 1 diabetes mellitus. This is a permanent condition which is not caused by the circumstances of his birth or his cerebral palsy. The condition is now managed by his use of an automated insulin delivery pump.
- [7] Christopher lives with his parents and his younger sister in the family home at Toowoomba. He is entirely dependent upon the assistance of others for everyday activities, such as eating, bathing, toileting, dressing and undressing, physical hygiene, the cleaning of his teeth and his movement around the house and elsewhere. He is incontinent for both bladder and bowel control. With some assistance, the heavy burden of his care to date has been borne by his parents. His father has given up work to do so. Christopher receives home schooling and also attends a local primary school on one day per week. For the rest of his life he will be totally dependent on the care of others and he will require the services of, or at least the presence of, carers on a 24 hour basis.

### **Probable lifespan**

- [8] For many heads of damage here it is necessary to assess Christopher's probable lifespan, or his probable survival as his counsel put it. Although this assessment is sometimes described as one of life expectancy, I will use that term to refer a different thing, which is the average age of survival of members of a comparable group. Although Christopher's likely lifespan is indicated by the life expectancy of a certain group or groups, it is a different measure because it has regard to Christopher's particular condition and any circumstances which tend to suggest that his prospects are different from that average.

### **Evidence as to lifespan**

- [9] As the respective arguments accepted, Christopher's likely lifespan is affected by both his cerebral palsy and his diabetes. One witness called by the plaintiff, Dr Kennedy, said that his lifespan would not be shortened by his cerebral palsy, but another witness for the plaintiff, Dr Harbord, said otherwise. So does the extensive published research which Dr Harbord discussed. But Dr Harbord said that Christopher's lifespan was likely to be longer than the average for children of his age who suffer cerebral palsy, because of his clinical assessment of Christopher's particular health and circumstances. He also said that there was some cumulative effect upon lifespan from Christopher's diabetes. Another witness for the plaintiff, Dr Jack, seemed to agree that his diabetes was likely to have that effect although it would be minimal. The defendant relies upon the evidence of its witness Professor Strauss. He has not made a clinical assessment of Christopher: he is not qualified to do so. But he has undertaken a statistical analysis of the life expectancy of a cohort of cerebral palsy sufferers which he says is fairly representative of Christopher's case. He also offered a view as to the extent of the cumulative impact of Christopher's diabetes.

- [10] I go first to Dr Harbord's evidence. He is a paediatric neurologist practising in Adelaide. He is not one of Christopher's treating doctors; he has examined Christopher twice but only for the purposes of this case. He has been a visiting paediatric neurologist at Adelaide hospitals and in private practice in paediatric neurology since 1990 and his résumé refers to his research interests as including epilepsy, birth asphyxia and neurogenetics. In that résumé, which accompanied the first of his reports, there is no reference to any particular interest or expertise in cerebral palsy or diabetes, or the effect of either upon lifespan. However, in his oral evidence, he said he was interested in the survival prospects of children with cerebral palsy because:

“As part of my everyday clinical practice, I look after children with cerebral palsy and I'm involved in the management of their case which is predominantly children with epilepsy but other aspects of their care as well, and that's in conjunction with paediatricians and general rehabilitation paediatricians.”

Because he is a paediatrician, his patients pass from his care to that of other specialists when they reach early adulthood. But he says that he has an interest in survival rates also from his membership of what is called the mortality review committee for intellectually disabled adults and children in South Australia, some of whom have cerebral palsy. Overall he could not be described as a researcher on the effect of cerebral palsy on life span. His opinions about Christopher's lifespan were given on the basis of his interpretation of the published research of others as well as his clinical assessment of Christopher. His opinion upon the impact of Christopher's diabetes has a less obvious foundation, as I will discuss.

- [11] Ultimately, Dr Harbord's view is that Christopher has an 85 per cent chance of surviving to age 30, and if he does so, then he should live another 35 years, subject to a two year reduction for Christopher's diabetes. He has reached that view in this way. On 22 October 2002 he examined Christopher and interviewed Christopher's parents. He was provided with information as to the circumstances of Christopher's birth and Christopher's medical history to that point. His first report was then written on 25 October 2002, when Christopher was then a six year old. Much of that report was concerned with the causes of Christopher's cerebral palsy. But he also addressed, as requested, Christopher's likely lifespan. He referred to a study by Dr Eve Blair entitled “Life expectancy among people with cerebral palsy in Western Australia”, published in 2001, which he said “showed that the highest rate of mortality in cerebral palsy occurred in the first five years of life, following which there was a steady decline to age 15, and then the mortality rate remained steady for the next 20 years”. He observed that as Christopher had survived beyond five years of age he had “therefore passed the period in which the highest rate of mortality occurs”. He said that Dr Blair's study had also found that “the strongest single predictor for outcome was intellectual disability” and observed that “Christopher is able to speak and is able to use a computer using his right foot, implying that he does not have a severe intellectual disability, and may in fact have an IQ in the borderline or average range”. (At that stage Christopher's IQ had not been assessed). He next referred to a study by JU Crichton, published in 1995, which he said showed that those with the choreo-athetoid type of cerebral palsy, as Christopher has, have better survival prospects than those with what he described as the spastic quadriplegic type of cerebral palsy. He then referred to a study

undertaken by Dr Jane Hutton entitled “Effect of severity of disability on survival in North East England Cerebral Palsy Cohort”, published in 2000, which he described as “the most accurate study of lifespan in children with cerebral palsy”. He noted Dr Hutton’s findings that life expectancy was affected by the child’s functional disability, i.e. manual and ambulatory disabilities, as well as by cognitive function. By reference to a certain table appearing in Dr Hutton’s paper, Dr Harbord then offered the estimate “that as Christopher has now survived to over six years of age, he has at least a 65% chance of surviving to 30 years of age”.

- [12] As to the prospects of surviving *after* age 30, Dr Harbord referred to calculations published by Professor Strauss (and another) with respect of life expectancy for adults with cerebral palsy, noting that they showed that the survival rate of adults was better than that of children, and was dependent on a person’s functional ability. Dr Harbord then offered the opinion that:

“... assuming that Christopher has no change in his functional abilities at 30 years of age, that he is able to roll and is independently able to crawl around, while he is fed by others and is not able to self feed, I estimate that if he survives to 30 years of age he will have an additional life expectancy of another 36 years, given that the lifespan of Australian males is 4 years more than United States males.” (The Strauss study involved American data).

- [13] He concluded in his first report as follows:

“On the balance of probabilities therefore, Christopher is likely to survive to 30 years of age. If he survives to 30 years of age, then his additional life expectancy will be a further 36 years at least, however I think this is likely to be further improved because he has a choreo-athetoid, rather than spastic quadriplegic form of cerebral palsy, and his IQ is likely to be near the average range. He does not have a severe or profound intellectual disability.”

- [14] Dr Harbord wrote another report in June 2004, after he had been sent a psychologist’s report showing Christopher’s IQ was in the average to above average range and also the first report of Professor Strauss (dated 24 March 2004). Dr Harbord revised his estimate of Christopher’s chance of surviving to 30 years of age, from the previous 65 per cent to 80 per cent, which he explained by the assessment of Christopher’s “normal IQ”, the good management of his diabetes, the good care he was receiving at home and the fact that Christopher had by then survived to aged 8. He said that if Christopher survived to 30 years of age, his expected lifespan would be an additional 32 years, which he said allowed for some reduction of lifespan for Christopher’s diabetes.

- [15] In February 2006, Dr Harbord saw Christopher again and wrote his third report. By then he had read reports by Dr Kennedy and Dr Jack. He again referred to the 2000 publication by Dr Hutton and the same table from that report. Noting that Christopher had now survived to almost 10 years and had an IQ in the “high-average range”, he again revised his estimate of Christopher’s lifespan by saying that he now had an 85 per cent chance of surviving to 30 years of age, and if so he was likely to live an additional 35 years, which allowed a reduction of two years for his diabetes. He was critical of Professor Strauss’ report:

“Epidemiological studies provide data about groups. To enable comparisons across groups, epidemiologists combine individuals into categories based on certain functional or clinical characteristics. However this does not necessarily provide an accurate picture about an individual with cerebral palsy. The questionnaire by Dr David Strauss and Robert Shavelle is necessarily a “pigeon-holed” overview of a patient’s clinical condition, but does not allow for individual variation. Epidemiological studies therefore can only provide an estimate of life expectancy which may not necessarily apply to an individual, especially if that individual is highly functioning compared to others in that group. For example Christopher’s mobility is much better than allowed for in the classification “rolls or sits”.

My clinical assessments of Christopher have shown that he is a bright, alert and interactive boy who is very co-operative and tries hard to carry out tasks, even when hampered by his choreo-athetosis. Characteristics such as determination and socialization skills are not rated in epidemiological studies but in my experience as a Clinician do significantly affect compliance with treatment and neurological outcome.

In my opinion therefore the best method of determining life expectancy of an individual with cerebral palsy is to combine their individual characteristics, with epidemiological data, rather than relying solely on the epidemiological data.”

- [16] Throughout, Dr Harbord has relied heavily upon the study published in 2000 by Dr Hutton. There are two difficulties which I see in Dr Harbord’s use of that study. The first is that it is not clear that Dr Harbord’s various estimates of the probability of reaching age 30 can be reconciled with what appears in Table 3 of that publication. The second is that Dr Harbord has not referred to a subsequent publication by Dr Hutton, which is a publication yet more difficult to reconcile with Dr Harbord’s estimate of prospects of survival to age 30.
- [17] In Table 3 within Dr Hutton’s 2000 publication, there were figures representing the probabilities of surviving to certain ages, including age 30, for cerebral palsy sufferers having regard to certain characteristics. Amongst those were cognitive, manual and ambulatory disabilities, each of which was separated into categories of “severe” and “not severe”. Undoubtedly Christopher’s manual and ambulatory disabilities would be within Dr Hutton’s severe categories. The Table showed a 60.1 per cent chance of surviving to age 30 on account of a severe manual disability and a 63.3 per cent prospect on account of a severe ambulatory disability. For those with a cognitive disability which was severe, there was a 65.2 per cent chance, and for those with a not severe cognitive disability, a 98.5 per cent chance of surviving to 30. Dr Harbord said that he revised his estimate of Christopher’s prospects of survival to age 30 upon receiving information to the effect that Christopher had an average to above average IQ. The evidence of the psychologist Ms Ewing, is that Christopher’s IQ is “at least within the average range for general intellectual ability”, with his IQ score on certain tests being above average and below average on others. But this Table (published by Dr Hutton) represents the effect of certain

disabilities on rates of survival, and indicates that the relatively poor survival prospects of someone with a severe manual or ambulatory disability are not significantly improved by that person having an average or above average intellect.

- [18] In this first report Dr Harbord seems to have increased the prospects of survival indicated by the Hutton publication for the fact that Christopher has choreo-athetoid cerebral palsy and not the spastic quadriplegic form. Yet he did not explain why that distinction would matter where there is a severe functional disability. He simply referred to what he said was Crichton's finding that those with the choreo-athetoid type are likely to survive longer, without discussing, for example, whether as a group they have a lower incidence of severe disability. Dr Harbord emphasised the importance of intellectual ability or disability. Yet it is difficult to see what impact this had on his original opinion because, as he then wrote, he did not have information as to Christopher's IQ. Overall, his original assessment of a 65 per cent prospect of survival to age 30 was a little more optimistic than the Hutton study would indicate, and the basis of that optimism was not persuasively explained.
- [19] In his second report, Dr Harbord placed particular reliance upon Dr Blair's study. Dr Blair's paper is in evidence although she was not called as a witness. As Dr Harbord wrote, Dr Blair's finding was that there was a low risk of death for people with a severe motor impairment but normal or near normal intellect. The defendant's case is critical of the Blair study, saying that it demonstrates no justification for that finding. Professor Strauss cannot see its basis. As I read the Blair article the basis is not apparent. Perhaps it was reasonable for Dr Harbord to rely upon it to increase his assessment of Christopher's prospects. But just how the Blair study indicates survival prospects approximating 80 per cent was not satisfactorily explained by Dr Harbord or any other witness.
- [20] Within any of the studies referred to by Dr Harbord, there is no quantification of the life expectancy of a group with severe functional but no intellectual disability. However that is provided by a more recent study by Dr Hutton, entitled "Effects of cognitive, motor and sensual disabilities on survival in cerebral palsy", published in 2002. The cohort the subject of that study comprised all children with cerebral palsy born between 1966 and 1989 in a certain part of England, involving 1,942 children. That study again represented various survival prospects by reference to the characteristics of disabilities with ambulation, manual dexterity and mental ability, but added data for hearing and vision disabilities. Most relevantly for present purposes, it also contained a graphical representation of survival prospects for various combinations of disabilities, and provides a comparison of survival prospects for persons with severe motor disabilities between those who also have severe cognitive disabilities and those with little or no cognitive disability. Dr Harbord agreed that this graph indicated that someone such as Christopher, with severe motor disabilities, normal birth weight and no cognitive disability, would have, as a two year old, about a 72 per cent chance of surviving to age 30. So it provides some support for Dr Harbord's figures of 80 per cent or thereabouts given Christopher's age. Professor Strauss says that this graph in the Hutton study corresponds with his own research. As it happens then, this more recent Hutton 2002 study, which Dr Harbord had not seen, provides substantial support for his evidence of Christopher's chances of surviving to 30.
- [21] Two further steps in Dr Harbord's reasoning must then be discussed. The first is his allowance of an additional 37 years should Christopher attain 30 years of age. The

second is his reduction of two years for diabetes. Dr Harbord's ultimate conclusion is not expressed in terms of an age to which Christopher is likely to survive; rather, he says that there is an 85 per cent chance of surviving to 30, and if so, he is likely to survive until 65. Obviously that is different from saying that at present, Christopher is most likely to survive to 65. Instead, on the assumptions of that 85 per cent chance, and that the mortality rate for his cohort group is constant between ages 10 and 30, the average (i.e. most likely) lifespan would be approximately 58 years (.15 (30-10) plus .85 x 65).

- [22] As already mentioned, Dr Harbord used data from an article by Professor Strauss (and Dr Shavelle) published in 1998 to estimate the additional years from age 30, and allowed "for the lifespan of Australian males to be five years more than United States males". But in his April 2006 report for this case, Professor Strauss says that the difference, according to more recent statistics, is 2.6 years, not five years. And I also accept Professor Strauss' comment that the figure of 2.6 years should be decreased because Christopher has a lower survival prospect than an average Australian male.
- [23] The basis for Dr Harbord's estimate of two years as an appropriate allowance for diabetes is not apparent. He does not claim a particular expertise in diabetes. Nor does he base this estimate on any studies of life expectancy, and in particular any involving a group with both cerebral palsy and diabetes. There is no evidence, at least in this case, of that kind. As I will discuss, Dr Jack appears to agree that Christopher's diabetes is a negative factor for his likely lifespan but does not venture any quantitative estimate. Professor Strauss feels able to do so, and says that there should be a reduction by at least five years. On any view of the evidence, the greater impact upon Christopher's lifespan is likely to be his cerebral palsy rather than his diabetes.
- [24] Professor Strauss has a degree in mathematics and a doctorate in statistics. He is a Fellow of the American Statistical Association and is Emeritus Professor of Statistics at the University of California. His present occupation is Director of the so called Life Expectancy Project, which is conducted from San Francisco. That organisation started in the 1970s at the University of California in order to undertake study in issues of survival and life expectancy. He now has an extensive knowledge of medical literature and research relevant to life expectancy. But he has no qualification in medical science and he is unable to make any clinical assessment. He describes his current occupation as a medical researcher in the area of life expectancy.
- [25] His work makes extensive use of a database maintained by the State of California, which stores detailed records of every person who in consequence of a disability, has received some service provided by that State, such as medical care, therapy, board and lodging or respite care. Anyone receiving such a benefit from the State of California must be registered in the database and must provide information in response to questions about their skills, disabilities, medical problems, medication and other information. There are about 300,000 people on this register and the details are updated annually. This provides the Life Expectancy Project with information from which it can analyse the life expectancy of particular groups, and relevantly for this case, cerebral palsy sufferers. From the database Professor Strauss was able to identify 2,208 children with cerebral palsy evaluated at the same age as Christopher, and with the characteristics of not being able to walk or feed

themselves, and who must be fed completely, but are not tube fed. The data for this group then provides death rates for the cohort over a period of 15 years: it can be seen that a certain number of the group died in one year and another number in the next, and so on. That mortality rate was then compared with the average mortality rate according to the standard Australian life table, from which the *relative* risk of death for the cerebral palsy cohort was computed. Professor Strauss said, without challenge, that it has been found empirically that from about the age of 30, the relative risk begins to decline at a consistent rate such that parity with the standard mortality rate would be reached (in theory) at age 100 years. This enables him to extrapolate mortality rates for those of the cohort who survived to age 30. Once there is this computation of mortality rates for the cohort across an entire lifespan, or in other words there is a calculation of how many of the group will die year by year, the average number of years of survival, or the life expectancy of the group, can be calculated.

- [26] Professor Strauss then made an allowance for the effect of diabetes. The result of the calculations within Professor Strauss' original report (24 March 2004) was that the life expectancy within the cohort, which he says is appropriate in Christopher's case, was a further 38.9 years beyond Christopher's then age of 7.8 years (total 46.7 years). And without his allowance for diabetes, his calculation was 44 years beyond Christopher's then 7.8 years. In other words he said that Christopher's likely lifespan was reduced by a further 5.1 years because of his diabetes.
- [27] In his more recent report (10 April 2006) Professor Strauss calculated a revised life expectancy of (in total) 48.7 years, compared with the previous (total of) 46.7 years. This again took into account Christopher's diabetes.
- [28] The principal attack upon Professor Strauss' evidence is that he has not made, and cannot make, any clinical assessment of Christopher. Whereas Dr Harbord has made a clinical assessment, and has then worked from a statistical base to estimate Christopher's individual survival prospects, it is said that Professor Strauss' evidence is wanting because it is purely a statistical exercise, which is less reliable for the fact that the statistical information does not fairly allow for Christopher's particular characteristics and circumstances. To some extent that argument has force. But it is not a basis for rejecting the entirety of Professor Strauss' evidence. As Dr Harbord's evidence illustrates, the foundation for some estimate of Christopher's likely survival is the statistical information resulting from extensive studies of cohort groups which have much, if not everything, in common with Christopher's case. Indeed Dr Harbord works from a premise as to adult survival which comes from some of Professor Strauss' research. Professor Strauss has access to a large database of information which is surely relevant, and his experience and learning in statistical analysis, particularly in relation to life expectancy, is of very high standing. There was no challenge to the correctness of his evidence in terms of his application of statistical theory and methodology. Instead it was said that he was not qualified to define the appropriate cohort group for that analysis, because he did not have the medical expertise to identify the characteristics and circumstances of Christopher's case which are significant for his life expectancy. That criticism was overstated. For example, amongst the extensive objections taken to Professor Strauss' reports at the commencement of his evidence, it was submitted that Professor Strauss was not competent to say that a characteristic such as "no functional use of hand" is relevant to life expectancy. However other research, such as Dr Hutton's work, does demonstrate the relevance

of that matter and Dr Harbord, for one, did not suggest otherwise. So in saying that it is a relevant characteristic, Professor Strauss was simply referring to an uncontroversial fact.

[29] It is argued that Professor Strauss should have focussed upon those persons whose cerebral palsy was of Christopher's type, the choreo-athetoid type, and excluded from the cohort those with a spastic quadriplegic form. This was because in one of the publications apparently relied upon by Dr Harbord, a study by Dr Evans, it was suggested that those with choreo-athetoid cerebral palsy had a 15 per cent better survival rate. Professor Strauss' view is that what is significant is not so much the cause or type of the cerebral palsy, but the nature and extent of the person's disability. He did not demonstrate the factual basis for that view by reference to the details of other research. But nor am I persuaded that his view is incorrect. Some of the other studies in evidence, such as those of Dr Hutton, would seem to be consistent with that view. It may be that any difference according to the type of cerebral palsy can be explained by the higher or lower incidence of significant factors, such as functional disability, which are associated with one type rather than another. Overall, this point does not present a substantial reason for rejecting Professor Strauss' analysis.

[30] As Professor Strauss identified in his reports, there are considerations which could affect survival which he has not factored into his calculations. He identifies as positive factors for Christopher, his normal vision and hearing, his normal oropharyngeal function, his satisfactory weight, the absence of recent episodes of pneumonia or aspiration pneumonia, his cognitive function being equal to or better than the average among his cohort (where the relevant characteristic for the cohort was the absence of "severe or profound mental retardation"), that he has no scoliosis or orthopaedic problems and that he takes no medication other than for his diabetes. Negative factors identified by Professor Strauss were that Christopher's speech is severely dysarthric (indicating dysfunction of the bulbar musculature) and his incontinence. These matters were not used in his computation because of the absence of sufficient data from the Californian register. Nevertheless, Professor Strauss said that the factors, taken as a whole, tended to increase the lifespan for Christopher from that according to his calculations. In his second report he wrote:

"It appears to me that the balance of positive and negative factors in Christopher's case is more favourable than average among children with comparable physical disabilities. If so, some upward adjustment to the life expectancies reported here may be indicated. In my opinion, such an adjustment should not exceed 5 years."

He acknowledges that his five year maximum in this respect is not a computed figure but was, he claimed, "a judgment of someone who works with these things quite a lot". One further factor was suggested in the cross-examination of Professor Strauss, which is that Christopher is likely to receive a relatively high standard of care compared with the average for this cohort. Professor Strauss saw the difference between poor care and, on the other hand, average or better care, as significant but did not accept that the difference between average and good care would matter.

[31] As to diabetes, Professor Strauss consulted a Canadian endocrinologist (who was not called as a witness) said to have expertise in the actuarial analysis of diabetes,

and adopted his recommendation to assume an excess death rate of 200 per cent of general population mortality. Professor Strauss then referred to certain major conditions which may develop as a consequence of Type 1 diabetes and ventured the opinion that the rating of 200 per cent may be a serious underestimate of the risk. But he also referred to the availability of evidence suggesting the mortality risk of diabetes may be falling as a result of advances in treatment. And he speculated as to the impact of Christopher's cerebral palsy upon the risks from his diabetes. I have no doubt that Professor Strauss was endeavouring to be helpful and fair in all of this. But he is not qualified to express opinions upon the likely quantitative effect on survival from diabetes. As he makes clear in his first report, he has worked from the opinion of an endocrinologist. If it be the fact, as Professor Strauss states, that an excess death rate of 200 per cent is consistent with actuarial practice in the business of life insurance, that fact does not establish that 200 per cent is an appropriate rate. Professor Strauss went on to say that "the latest literature" shows that the excess death rate is yet larger than 200 per cent, and he identified a particular paper but it was not put in evidence. His evidence about diabetes is markedly different from that in relation to life expectancy for cerebral palsy sufferers. In respect of diabetes, he has not undertaken his own statistical analysis but instead relies on what he was advised by an endocrinologist and what he says is another's statistical analysis.

- [32] The endocrinologist who did give evidence, Dr Jack, does not accept that this 200 per cent excess death rate is appropriate to Christopher's case. She believes that it is inappropriate because the prognosis and likely survival of diabetic patients is improving. She said that there is a marked reduction in complications because of improved diabetic control. She did not offer her own figure but said that if Christopher's diabetes was well managed, his "background risk" would be "then approaching normal but not zero risk". I am persuaded by Dr Jack's evidence that Professor Strauss' adoption of a 200 per cent excess death rate for diabetes was excessive. The "latest literature" to which Professor Strauss referred to was not put to Dr Jack. The overall impact of Christopher's diabetes for the Strauss calculations is about five years, so that his figures require some adjustment, although as Dr Jack apparently agreed, some allowance must be made for diabetes.
- [33] Dr Martin Kennedy gave evidence in the plaintiff's case. He is a specialist in rehabilitation, pain and palliative medicine and practises in Sydney. He gave evidence on a number of issues, including life expectancy. In his first report (16 February 2005) he wrote:

"I do not anticipate there will be any alteration to Christopher's life expectancy as a result of his cerebral palsy. With good diabetic control, Christopher can also expect to have a near normal life expectancy from this perspective as well."

He referred to no literature or studies in those respects. In oral evidence he said that his opinion on life expectancy as a result of cerebral palsy was based on his experience with his own cerebral palsy patients. I do not find those opinions persuasive. His view about cerebral palsy is quite inconsistent with published studies, and in particular those discussed by Dr Harbord, and it is an inconsistency he could not satisfactorily explain.

- [34] The plaintiff also relies upon what was written in a report by Dr G Wallace, which was addressed to the defendant's solicitors but ultimately tendered by the plaintiff. Professor Strauss had been sent that report and therefore referred to it in his first report. Dr Wallace said there that there should be no effect on Christopher's lifespan from his cerebral palsy. In making that submission, the plaintiff's counsel appear to have overlooked the basis upon which they agreed that the Wallace report could be tendered, which was that they would not rely upon the opinion within it but only as evidence of what was available to Professor Strauss (if that be relevant). In any case, I could not give it any weight against the evidence of witnesses who did give oral evidence, including the plaintiff's witness Dr Harbord. And again, it is inconsistent with the published studies.

### **Assessment of lifespan**

- [35] This issue of Christopher's likely survival occupied a considerable time in the evidence and the arguments. There is a vast difference between the respective submissions on this issue. Ultimately it is argued for the plaintiff that his survival "should be of the order of 85% of normal which is a reduction of just under 10 years from 68.6 to 58.31 remaining years", i.e. that he is likely to live to at least 68. The evidentiary basis for that argument is not apparent. The defendant's argument is that an additional 38.6 years should be assessed, which is the most recent calculation of Professor Strauss.
- [36] I accept that the Strauss analysis has its limitations. In principle, the estimate of Christopher's likely survival ought not to be simply a statistical exercise but should involve also a clinical assessment of Christopher's individual health and circumstances. Accepting that proposition, nevertheless a clinical assessment does not ensure a precise and correct answer either. Yet for all of the time spent on this question at the trial, ultimately there is no substantial difference in outcome between the different approaches of Dr Harbord and Professor Strauss. That is not surprising for Dr Harbord heavily relies, correctly in my view, upon the information available from various published studies and most notably, publications of Professor Strauss.
- [37] Both Dr Harbord and Professor Strauss accepted the probative value of the Hutton studies and in particular the survival rates indicated by her 2002 paper. From the graph in that paper, it is possible to plot the number within the cohort group who will die between the ages of 10 and 30, and it can be seen that the rate of death is fairly constant within that 20 year period. So the graph would indicate that a 10 year old, within the category accepted as relevant by Dr Harbord, would have at least an 80 per cent chance of surviving to age 30. (The graph indicates about 90 per cent of the group alive at age 10 and about 72 per cent of them alive at age 30). Dr Harbord says that from age 30, the life expectancy is indicated by other studies of Professor Strauss. So subject to issues of diabetes and the extent of differences in survival between California and Australia, there ought be no marked difference in their respective analyses. For example, if Dr Harbord's evidence is accepted in its entirety, save that his allowance for difference in death rates between California and Australia is reduced from five years to say three years (see paragraph 22 above), the resultant calculation is a survival to age 56.55 years (.85 X 63 years plus .15 X 20

years<sup>2</sup>). Alternatively, upon Dr Harbord's previous estimate of an 80 per cent prospect of survival to age 30, the resultant figure would be 54.4 years.

- [38] Against that evidence there is Professor Strauss' calculation of likely survival to age 48.7, which should be revised upwards at least for two reasons. The first is the unquantified effects of the positive factors, as against certain negative factors, discussed above at paragraph [30]. In his first report, Professor Strauss said that as much as five years overall might be added for these matters. The second is that some adjustment must be made for the excessive allowance he made for diabetes. Once those two matters are considered, it can be seen that there is no substantial difference between these witnesses. So, for example, allowing four years overall for those other positive factors identified by Professor Strauss, and deducting say three rather than about five years for diabetes, would change the Strauss estimate of lifespan to about another 44.6 years, that is to at least age 54.
- [39] The submission for the plaintiff, that I should allow 58 remaining years, misunderstands the evidence. No witness, including Dr Harbord, said that Christopher's survival quote should be of the order of 85 per cent of normal. Dr Harbord said that he had an 85 per cent chance of surviving to age 30 and thereafter his survival would be diminished according to other studies of Professor Strauss.
- [40] In my conclusion I should assume a likely survival of an additional 44 years.

### **General damages**

- [41] The plaintiff claims an amount of \$300,000. The defendant argues that \$220,000 should be allowed.
- [42] The plaintiff argues that reference should not be made to other awards, because "the plaintiff's circumstances are quite unique and this would justify a wholly individual approach to the assessment of general damages". The defendant's argument does rely on other cases. It relies upon *Castro v Hillery & Ors* [2001] QSC 510 where a 36 year old plaintiff who suffered severe brain damage and physical injuries, and lost her ability to speak but had insight into her problems, was awarded \$160,000 for general damages. It relies upon *Goode v Thompson* [2001] QSC 287 where a 12 year old boy who suffered very severe brain damage as well as orthopaedic injuries but had limited insight, was awarded \$150,000. In *Winterton v Mercantile Mutual Insurance* [2000] QCA 249 a 14 year old plaintiff sustained severe brain damage and was awarded \$200,000 by the trial judge which was reduced to \$150,000 on appeal. The defendant also points to *McChesney v Singh* [2003] QCA 498 where a plaintiff suffered a major brain injury and orthopaedic injuries was assessed for general damages at \$150,000, which was upheld on appeal. She was 17 when injured. And the defendant also cites *Theден v Nominal Defendant* [2004] QSC 310, although that involved at 41 year old plaintiff suffering tetraplegia, for whom general damages were assessed at \$200,000.
- [43] It can be seen from those awards, most of which at least are relevant, that the sum claimed by the plaintiff is relatively high. Christopher has had his cerebral palsy for all of his life and he has insight. His case warrants a very high award for general

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<sup>2</sup> Average age of the 15 per cent dying between 10 and 30, assuming a constant death rate within that period

damages. But I am not persuaded to award \$300,000. The defendant's submission of \$220,000 is a reasonable one and I was told without any challenge that the highest award for general damages in Queensland to date has been \$200,000. Accordingly I will award general damages at \$220,000.

### **Interest on general damages**

- [44] I will allow interest on \$44,000 which is 20 per cent of that award for general damages. It is common ground that interest should be calculated at the rate of two per cent on that sum from Christopher's birth. I will allow \$9,000 interest on general damages.

### **Future care**

- [45] For the rest of his life, Christopher will remain fully dependent upon assistance for feeding, toileting, bathing, movements around his house, travel, use of medication, procedures to manage his diabetes, and any form of physical exercise including stretching and massage. Even with the assistance of hoists, the task of transferring Christopher to and from his bed, wheelchair, bath and toilet will continue to be demanding, and is likely to become more so as he grows. Christopher will have the use of computers and other aids for his education and communication but his carers will need some level of competence in assisting him in those respects. They will also need training in the use of the insulin pump. Dr Jack said that would require about two three hour training sessions plus some follow up, and that the principal difficulty is in training a person to compute how much food the child has consumed so as to program the pump, although devices are now being developed where that will be computed by the device itself. Mrs Hills says that Christopher can sometimes but not always detect when his blood sugar level is low. He will be able to tell a carer that it is low, with the use of the communication devices he will have, such as that called the pathfinder. Dr Jack did not think that his blood glucose levels would have to be checked every night but sometimes this would be required. In any case, it is agreed that Christopher will need the attendance of a carer throughout the night.
- [46] On the evidence, if not in the submissions, there is no substantial controversy as to the required level of competence of a carer for Christopher. It is submitted by his counsel that Christopher will require "highly qualified, skilled, experienced, competent, sensitive and ethical carers". As to what is that level of qualification, the plaintiff's case relies upon the evidence of Ms Robertson, a director of the agency "Dial-an-Angel", whose view is that the carers should be competent and experienced attendant carers, with experience in the manual handling of a disabled person, and should have a current first aid certificate, but they need not be qualified at the level of a registered nurse. She provided her company's rates for carers trained at the level of an enrolled nurse, or what she described as a "level 3 disability support worker". That is not an industry standard but is what Ms Robertson described an "internal thing", i.e. a comparative standard used within Dial-an-Angel to describe the relative difficulty of the particular assignment. It has 6 levels of which level 1 is the least demanding. So for her agency the rate of pay is determined by the degree of difficulty of the job rather than the qualifications of the carer. When asked to comment upon a report by the defendant's witness Mr Hart,

in which he discussed the appropriate level of qualification, she seemed uncritical of Mr Hart's evidence in that respect.<sup>3</sup>

[47] Mr Hart is the principal of Quality Lifestyle Support Pty Ltd ("QLS"), which since 2000, has carried on a business based in Toowoomba of the provision of care services to disabled and elderly people. It operates upon what is called a managed care basis, meaning that it employs the carers and hires them out to the client. Ms Robertson says that Dial-an-Angel sometimes provides carers upon this basis, but apparently it usually provides what she calls referred care, under which for a fee it refers a carer to the client who then becomes the employer. The difference is significant as I will discuss. But it is not significant for the appropriate level of qualification and experience of the carer.

[48] In his initial report<sup>4</sup>, Mr Hart said that a carer in Christopher's case should have what he described as a "Certificate 3 in Community Service Work (Disability) or associated qualifications at the same or higher level" and "protective practices and behavioural support training or associated training". All carers employed by QLS are vetted by checks with the police and in the case of child carers, a requirement for what is called the blue card. He says that those requirements and qualifications "are viewed widely as the standard required by the sector", but that additional skills would be required in Christopher's case which would be gained through "in-house individual training with the client utilising a professional advisor or trainer". He described that further training as follows:

1. W.H.S., Medication, systemic procedures and policy training (provided at staff induction to Q.L.S.)
2. Hoist and specific equipment training (provided by professionals associated with the specific equipment).
3. Advance resuscitation training (provided by St John's or organisations such as CABB Australia Pty Ltd).
4. Diabetes management training (normally on an individual case basis by the treating Physician).
5. Support plan implementation training with the relevant service Coordinators in conjunction with treating physicians such as Dr Geoff Wallace.

#### Training component:

It is often necessary for Q.L.S. when undertaking a support situation as described for Christopher, that additional training time be allowed for on site training. This can vary dependent upon requirements, however, in a similar situation support by Q.L.S., the allocation of five double up shifts per support person have proven sufficient. Given that current retention rates are about 2 years per employee a

<sup>3</sup> Her report of 16 February 2006 commenting upon his report of 20 January 2006

<sup>4</sup> 31 August 2005

team of say six individuals would require 15 additional shifts per year.”

- [49] In a later report<sup>5</sup> he described the necessary qualifications and training in these terms:

“Although the responsibilities for monitoring and reacting to Christopher’s needs with regard to diabetes are high and at times stressful, this does not constitute the requirement of trained medical staff. A number of individuals supported by disability support agencies including Q.L.S. are provided with paramedical type support such as oxygen administration, rectal medication, gastro nasal and peg nutrition.

In Christopher’s situation training would have to be conducted specifically around the use, maintenance and monitoring of the insulin pump, as well as blood glucose monitoring (pinprick testing). This training is able to be provided by CABB Australia Pty Ltd at a cost of \$75 per hour. Q.L.S. continues to contract this service for other service recipients and is provided with excellent training and scrutiny by Terri-Ann Nesbitt CA RN MRCNA Dip App Sc (N) B Ed (AWE). Currently family support this area of Christopher’s life without formal medical qualifications.

However supporting individuals, would require as standard, the competencies of a level 2 support person pursuant to the Q.L.S. enterprise Agreement

Senior first Aid

Advance resuscitation

Specific disability training with regard to Cerebral Palsy

Hoist and transfer training

General diabetes training and advanced specific training for the individual client.

It would be an advantage for a consultant who specialises in diabetes training, to be retained to regularly monitor technique application amongst support staff. In similar situations monthly consultations for a period of 1 hour plus on site checking of 2 hours is usually sufficient for a team of six to eight, the size required to provide care in a high level support model.”

- [50] Ms Robertson says that her organisation is especially demanding, and selects only a small proportion of those who seek work through it. It was strongly suggested to Mr Hart that his organisation is not so demanding, and that this explains why the QLS charges are lower, in some circumstances at least, than those of Dial-an-Angel. I am unable to assess whether QLS would engage some people whom Dial-an-Angel would not. But if QLS requires its carers to meet the standards described by Mr Hart, then the market rates for their services are probative, regardless of the suggested comparison with Dial-an-Angel. It was also suggested

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<sup>5</sup> 20 January 2006

that QLS has an unduly high rate of staff turnover. Mr Hart denied that, giving evidence that the QLS turnover of about 30 per cent a year corresponded with that in the industry. I see no reason to reject that evidence.

- [51] The ultimate argument for the plaintiff is that I should reject Mr Hart's evidence because, it is said, the QLS charges, the amounts which it pays to its carers, and the suggested high turnover of its staff indicate that it will not be able to provide appropriate services at its present charges over the long term. Yet QLS has been in business for about six years. Most of its income seems to come through schemes administered by the Queensland or Commonwealth Government, as well as from what Mr Hart describes as self funded clients. As a service provider to Disability Services Queensland, QLS is required to adhere in the payment of its staff to the Disability Services Award or the Social and Community Services Award. It currently supplies carers for about 100 individuals in various locations around Ipswich, Toowoomba and South West Queensland, averaging about 5000 hours of support per week. About 30 of its clients are receiving care 24 hours a day from QLS. It has between 90 and 100 employees. I am far from persuaded that its present pricing is not sustainable, or that its prices do not evidence the market price for relevant care.
- [52] The relevant enquiry is not whether Christopher's carers are likely to come, or ought to come, from one organisation or the other. That is because the damages to which Christopher is entitled are not to be determined by reference to whether he will pay, or if so, what he will pay, for his care, but according to the reasonable value of that service which ordinarily is measured by the price for which such a service is supplied in the relevant market: *Van Gervan v Fenton* (1992) 175 CLR 327 at 334-335. In the market relevant for this case, QLS appears to be a substantial participant and its prices are probative of the market cost. As most of its fees are funded by Disability Services Queensland, which would be expected to be an informed and perhaps the largest consumer in that market, its prices are likely to fairly indicate the market cost of what is called managed care. As I will discuss, Ms Robertson's organisation would charge much higher sums at least for managed care, although its rates for referred care might not be much different from the cost of managed care through QLS. But if the QLS rates were significantly below the rest of the market, that could have been demonstrated easily enough.
- [53] In my view Mr Hart's evidence ought to be accepted as proof of the cost in the Toowoomba market of the care which he suggests. To the extent that a higher figure would be charged by Dial-An-Angel for care provided upon an equivalent basis, I am not persuaded that the market cost should be assumed to be that higher figure.
- [54] The cost of care varies according to the length of the carer's shift. The effective hourly rate is higher for an 8 hour shift than for a 12 hour shift. There is a considerable debate about the length of shift which would be appropriate here. Ultimately the plaintiff's case seems to accept that a carer could work a 12 hour shift through the night. Mrs Hills, for example, agreed with that. But it is said that the burden during the day would be too great for a 12 hour shift so that some "care model" involving shorter and relatively more expensive shifts would be appropriate. The defendant's case is that the assessment should assume shifts of 12 hours.

[55] I have described already the demands upon a carer for Christopher. The work would be physically demanding and require a high level of concentration. No witness seems to suggest that an eight hour shift would be too much, but some say that a 12 hour shift would lead to work 'burnout' for at least some carers. The witnesses on this issue fall into three groups. First there are Mr and Mrs Hills, who understandably have the greatest knowledge of what Christopher's day to day care involves. The fact that they have managed to provide his care to date is not to say that a 12 hour shift is realistic. Mrs Hills has described the burden of Christopher's care at times would become too much for her, and that she would have to move out of the house for short periods to recover. Unlike Mr and Mrs Hills thus far, a professional carer would have the advantage of a break at the end of a shift. And the carer would not have the burden of looking after Christopher but at the same time managing the entire Hills household including another child. So Christopher's parents' assessment of what professional carers could manage is relevant but not necessarily correct. Secondly, there are Ms Robertson and Mr Hart. Because of their extensive experience in the provision of care services, and the employment of carers, they are well qualified to offer opinions as to what carers could manage. Thirdly, there are some other witnesses, who work as occupational therapists or social workers, and whose work has allowed them to see the provision of care in comparable circumstances. But they who do not have the vantage point of those whose business it is to employ carers and to allocate work to them.

[56] On the face of their respective reports, there is no difference between Ms Robertson and Mr Hart on this point. In her report of 27 January 2006, written with the benefit of reports from amongst others Ms Stephenson, occupational therapist, and with the benefit of a DVD which shows a typical day in the care of Christopher in his house, Ms Robertson was asked to advise on an appropriate care 'model'. She wrote:

"You have asked us to indicate the type of care model that we would set up with Christopher. There are many different scenarios of care available but we recommend 2 X 12 hour shifts per day on an ongoing basis either on a referred or managed care basis. The day time shift is likely to be fairly intensive and demanding. The 12 hour overnight shift wouldn't be as demanding as the day shift but carers would not be able to sleep. Christopher's blood sugar levels would need to be checked as well as the need to roll/lift and turn him every few hours and ensure he is kept comfortable. Mr and Mrs Hills currently attend to Christopher up to four times each night."

[57] In his first report Mr Hart discussed three alternative models. Under what I will call his first model, the work would be shared between professional carers and Christopher's parents, which he said would allow "for the family to still be responsible for adequate levels of support for Christopher, alleviating the intrusiveness that occurs with having high levels of support worker engagement within the family home." Under the second of his models, there would be two 12 hour shifts each day, performed by a team of six or seven paid carers which he says would provide for "adequate rotation and backup staff". It is this model which he would recommend once Christopher chooses to live independently of his parents. His third model involved 24 hour shifts, which he said had some advantages – it is cheaper than the second model but which he seemed not to prefer. In a subsequent report, he revised his second model to provide for effectively 25 hours per day, so that there would be some work done at times by two carers on the change of a shift.

Under his second model, the night time carer would stay awake to be able to immediately respond to Christopher's needs. The result is that Mr Hart agreed with Ms Robertson's report that a model of two 12 hour shifts would be the most appropriate, if and when Christopher is cared for entirely by paid carers.

[58] In that third category of witnesses is Mr Kennedy-Gould. His qualification is as a social worker and he has some decades of experience in work with disabled people. By the time he retired from the New South Wales public health system, he was the most senior social worker working in mental health services. Since then he has been a social worker in private practice, which he describes as "a multi-disciplinary practice specialising in medico-legal work" with work that includes "provision of case management services to solicitors undertaking litigation on behalf of brain injured clients involving referral, follow-up and family and individual counselling". His practice also includes individual and family counselling for clients with acquired brain injury and he "assesses and reviews approximately 250 clients each year suffering the range of intellectual disabilities, many with the complications of severe physical disability." That involves his recommendation of "appropriate accommodation and care packages". I accept that his experience makes him competent to express an opinion about the chances of carers being able to work 12 hour shifts. But his experience for this issue is not as valuable as that of Ms Robertson and Mr Hart, who are in the best position to assess the demands and effects upon carers, because they employ them. Mr Kennedy-Gould said that an eight hour shift was appropriate. He agreed that he gave evidence, in another case involving a comparable plaintiff<sup>6</sup>, to the effect that carers could well work 12 hour shifts. But he said that his more recent experience has changed his mind. Accepting that is so, his evidence should not be given the weight of Ms Robertson and Mr Hart on the point.

[59] Another witness within this third category is Ms Stephenson. In her report of 5 July 2004 she wrote:

"Christopher Hill's care requires the carer to be closely monitoring him at all times for his safety. This highly focused care requires extreme responsibility, focus and attention which over time is very draining. For this reason, it is considered that future care would be best provided for by a team of approximately six carers minimum, working in rotating shifts of *six to twelve* hours per day."  
(emphasis added)

In her report of 9 November 2005, Ms Stephenson said that 12 hour shifts would be acceptable at night but not during the day, when the maximum should be eight hours. I do not accept the defendant's argument that she qualified that opinion when saying, in cross-examination, that 12 hour shifts were not "ideal" or the "optimal situation". She continued to express reservations about the ability of carers to work 12 hour shifts. Her evidence as an occupational therapist has weight but again she does not speak from the specific experience of Ms Robertson or Mr Hart.

[60] In reality, there would be some carers who could work a 12 hour shift and some who could not, although being well qualified, experienced and otherwise competent. It is appropriate, in my view, to work from the premise of two 12 hour shifts, with

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<sup>6</sup> *Simpson v Diamond* [2001] NSWSC 925

the addition of one hour per day as Mr Hart suggests, and with some adjustment for the fact that from time to time, through the practicalities of rostering carers, there would be some shorter shifts.

- [61] The defendant accepts that I should assume that Christopher will live independently from his parents, and from that time will require a 24 hour care according to Mr Hart's second model. It argues that I should assume Christopher's independence from age 21. Each of those assumptions is realistic and I will make them. For the plaintiff it was argued I should assume independence from age 18 but I think that that is less likely in Christopher's circumstances.
- [62] The defendant argues that I should assess the need for care from now until age 21 on the basis of Mr Hart's first model. It is for eight carers on 12 hours shifts Monday to Friday from 7:00 am and 3.5 hour shifts on those days from 7:00 pm. On Saturdays paid carers would work 7:00 am to 10:00 am and 5:00 pm to 10:30 pm and on Sundays a 12 hour shift from 7:00 am. Outside those hours Christopher would have his parents and other family members to look after him. But for those periods of unpaid care, the defendant's argument is that only one hour per day should be allowed. The plaintiff's case is that I should allow for 24 hour care because "it is envisaged that Mr and Mrs Hills will very soon cease to be his carers and engage a case manager to employ carers". Undoubtedly Mr and Mrs Hills will engage paid care to some extent with the benefit of Christopher's award. But more probably than not the position will resemble Mr Hart's first model. It is unlikely that Mr and Mrs Hills would quickly hand over all of the care for Christopher, especially as they have no experience of a regime with a paid carer in the house, let alone on a 24 hour basis. Mr Hart's first model appears to be a sensible balance between Christopher's being cared for most of his waking hours by paid attendants and his having time with his family without the intrusion of the carer. But why does it matter whether Christopher's care will be according to Mr Hart's first model or instead his second model?
- [63] In *Mott v Fire and All Risks Insurance Co Ltd* [2000] 2 Qd R 34, a majority of the Court of Appeal held that a claim for the need for future care should be the subject of findings by a trial judge as to how much of that need is likely to be satisfied by paid carers and how much by unpaid carers. Their Honours so held upon a construction of s 16(1) of the *Supreme Court Act 1995*, (which requires a discount rate of five per cent), by which it did not apply to an assessment of care likely to be provided gratuitously. For that component, a rate of three per cent is to be applied.
- [64] The defendant argues that the distinction between paid and unpaid care is also relevant because I should value the unpaid care provided by Mr and Mrs Hills at less than the market cost of paid care. That was said to follow from what Williams JA (with whom Davies JA and Wilson J agreed) said in *McChesney v Singh & Ors* [2003] QCA 498. But Williams JA did not hold that the services were to be valued differently according to whether they would be provided gratuitously, and that distinction would be inconsistent with *Van Gervan v Fenton*. In *McChesney* the gratuitous services were valued at less than a commercial rate because they were, in the circumstances of that case, found to be less demanding upon the carer than those for which the commercial rate would be charged. In the present case, there is no such distinction. The quality of the care which is likely to be provided by Mr and Mrs Hills, or by Christopher's grandparents or his uncle, would be at least equal to that which would be provided by a paid carer. Nevertheless, at least for the

reason of the different discount rates according to *Mott*, it is necessary to make findings as to how much of the burden will be borne by unpaid carers.

- [65] I accept that I should assess on the premise of Mr Hart's first model which is the most likely arrangement until Christopher leaves home. Under that model, Christopher's need would be met at times by paid care and at all other times by gratuitous care. Yet the defendant argues that only seven hours per week should be allowed for gratuitous care, although Christopher would be in the care of his family every night, for most of a Saturday and on a Sunday evening. The defendant's argument is that during those hours, and in particular on a Saturday, "full care" should not be allowed because "in that time the parents are being parents and Christopher's being a child". It was argued that "we don't compensate the parents for being on standby in their own home as if they were an alert commercial carer. They are, in fact, living as a family unit". The argument is that when Christopher would be with his parents, they would be providing "occasional snippets of care for which there should not be compensation as if they were professional carers being paid for their presence as well as their particular efforts".
- [66] There are two issues involved in that argument. The first is the extent to which Christopher requires care in the relevant sense, i.e. care which results from his cerebral palsy (including the problems in his diabetic management from his cerebral palsy). Children who are not disabled require care and in their early years on a 24 hour basis. As they grow up they need less care although they still have to live in the protection of the family household. It is the extent to which Christopher has required, and might still require care beyond that which would be necessary if he were not disabled which is the need which is to be compensated. At his present age of 10, if Christopher was not disabled he would still require the care of his parents but obviously not to the same extent. If some of the time allowed under Mr Hart's model is no more than the parental care which Christopher would require if not disabled, then it is not compensable. A 10 year old boy without Christopher's disabilities would require parental care, and on a diminishing basis over the next few years. But because of his disability he needs the presence on a 24 hour basis of people who are able to attend to his care.
- [67] The other issue raised by this submission is whether it is appropriate to compensate Christopher by reference to commercial care rates where the care would be provided by his parents whilst at the same time they did other things around the house. Christopher needs the full time attendance of carers but not their personal exertion for every minute they are there. The description of "occasional snippets of care" understates what is required, but I accept that whilst Mr and Mrs Hills are looking after Christopher, they will be able to do other things to some extent. The argument then is that as "gratuitous carers in their own home going about their own business" they should be "compensated for those occasional snippets, not being for 24 hours". That argument is inconsistent with principle, and in particular with *Van Gervan v Fenton*. This is not an assessment of compensation for the parent's efforts, but of Christopher's loss which is his need for care which he would not need but for the defendant's wrong. He needs the presence of someone, 24 hours a day, who is able to immediately respond to his various requirements.
- [68] In the assessment of that loss, it is irrelevant to inquire whether he is likely to pay anything for that service or what would be paid. The assessment is one of the "reasonable and objective value of the need for those services" for which, as a

general rule, the market cost is the measure<sup>7</sup>. But in some cases the market cost may be too high to be the reasonable value of the services and in *Van Gervan*, Mason CJ, Toohey and McHugh JJ instanced the cost of providing services at a remote location where the cost is much greater than the equivalent in a densely populated area or where there was so little competition that, judged objectively, the market cost was not the reasonable value of the services<sup>8</sup>. But nevertheless the exercise is one of valuing the service which is needed by the plaintiff. There is no difference between the required services according to whether it is Christopher's parents or a paid carer who there is to provide them. And there is no difference, for example under Mr Hart's first model, between the required care on a Saturday afternoon (to be provided by the parents) to that required on a Sunday afternoon (to be provided by the carers). This is not a case where it can be said the market cost is an inappropriate measure of the value of the care, because as the defendant indeed argues, the value is to be measured by the market cost evidenced by Mr Hart's rates. So the assessment of the value of the required care must be by the consistent application of market cost whether the care is likely to be provided by the market or not. The fact that Christopher's parents will be able to do some other things in the house whilst caring for Christopher does not diminish the value of the care they are providing.

- [69] Accordingly, although I will assess Christopher's future care needs for the next 11 years (to aged 21) on the basis of Mr Hart's first model, I will allow the same rates for gratuitous care as for paid care. That does not mean that I will allow for every hour where there is no paid carer in attendance, because there must be some consideration of what care would be required if Christopher were not disabled.
- [70] That last point is the subject of a substantial dispute in relation to the claim for past care and it is convenient to discuss it now. The particulars of the plaintiff's case accepted the proposition that Christopher could recover only to the extent that he required care at times at which he would not have required care if not disabled. At the trial however the plaintiff's case for past care was advanced in this way. Detailed evidence was given, in particular by Mr and Mrs Hills, as to the high demands upon them from having to care for Christopher and specifically to the effect that a certain amount of time spent in the care of Christopher was far more demanding than the same time in the care of, for example, their other child. In general, that is undoubtedly correct, although there might be some question about the detail of this evidence, given its apparent inconsistency with what they had told Ms Stephenson for the purposes of her report. But the point of principle is whether that difference in the extent of the burden upon the carer, within a given period of time, represents a compensable loss suffered by Christopher. For example, children less than, say, two years old require the presence of some responsible person at all times and need active assistance throughout the day in very many activities. They need full time care. But the plaintiff's proposition is that Christopher required more intensive full time care, and that he should be compensated for the difference.
- [71] In my view the plaintiff's argument should be rejected. Again, this argument appears to mistake the position of the carer, in this case the parents and what would be a reasonable allowance for that carer with the question of whether the plaintiff needs to be cared for *because of the defendant's negligence*. The plaintiff's

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<sup>7</sup> *Van Gervan v Fenton* 175 CLR 327 at 333

<sup>8</sup> 175 CLR 327 at 334

proposition has been rejected in several cases: see *Rotumah v NSW Insurance Ministerial Corporation* (unreported, Supreme Court of NSW, 6 April 1998); *Ren v Mukerjee* (unreported, Supreme Court of the Australian Capital Territory, 12 December 1996 and *Simpson v Diamond* [2001] NSWSC 925.

- [72] For a 12 hour shift the QLS charge is \$211 (equivalent to \$17.58 per hour). For the 3.5 hour shifts recommended by Mr Hart, the rate would be \$29 per hour as it would be for the extra one hour allowed in his model of two 12 hour shifts. He has also estimated \$4,500 per year for training of carers. This is upon the basis of \$75 per hour which is charged for training by an organisation independent of QLS, which is CABB Australia Pty Ltd. It is also on the basis of an assumed staff turnover rate in Christopher's case of 50 per cent which is higher than QLS's average rate of 30 per cent. This would cover specifically the cost of training in the management of his diabetes.
- [73] The Dial-an-Angel rates are on the basis of referred care, i.e. where the carers are employed by the client. In her first report Ms Robertson quoted \$213 per 12 hour shift for week days, changing to \$233 on weekends, and representing an average of \$18.22 per hour. This was on the basis that the carers would be employed on a casual, not a permanent, basis. It includes the Dial-an-Angel commission of about \$33 per shift resulting in the carer receiving \$15 per hour. Ms Robertson says that penalty rates for holidays are "normally discussed and agreed upon prior to the engagement of the worker" and there is also the cost of WorkCover insurance which she says would cost only about \$12 per year as long as the carer involved earned less than \$98 per week. Otherwise the client as the employer would be required to register as a group employer. A worker who works more than 30 hours per week would also be entitled to superannuation at nine per cent from the client. If there is a team of six or seven carers, as Mr Hart suggests, then on average a carer would work less than 30 hours per week.
- [74] During the trial the plaintiff's case was developed further along the lines of a scenario whereby carers would first be employed as casuals but become permanent employees after some months. As permanent employees they would be entitled to certain other benefits which would increase their cost. Their permanent placement would also attract a fee payable by the client to Dial-an-Angel estimated at \$2,200 for each engagement. In this event the client would no longer pay the \$33 agency fee per shift, but the overall cost, Ms Robertson said, would be higher than if the carers remained casual employees. In the later report she also quoted \$159.50 for a six hour shift and hourly rates for Christopher as a child ranging from \$18.50 to \$24.50 (\$37 per hour for holidays) and as an adult \$24 to \$30 per hour (\$48 for holidays).
- [75] A system of referred care would obviously place a considerable administrative load on Christopher and those assisting him because he would become an employer of at least six people whom he would have to organise and re-organise for a series of shifts. A system of managed care would be preferable in Christopher's case, not only for reasons of convenience and administrative burden, but also because, as Mr Hart said, referred care would make Christopher even more vulnerable to abuse or neglect by an individual carer if he has no organisational support. In practice, he could have a combination of the two. But the provision of his care is likely to run more smoothly if there is a single agency controlling the team of carers and able to fill a gap from its ranks at short notice. Mr Kennedy-Gould was troubled by a

managed care model for Christopher although it seems that he has not always been of that view in similar cases. I prefer Mr Hart's evidence, based as it is on considerable experience of the business of the provision of this service, that the managed care model is preferable. Ms Robertson said that Dial-an-Angel's services include managed care but the costs are at least 70 per cent higher than the equivalent care on a referred basis. It is at that point that the respective prices between QLS and Dial-an-Angel substantially diverge.

- [76] In Mr Hart's model of two 12 hour shifts a day, there will be occasions when, for example, a carer is unable to work a 12 hour shift and at short notice some backup will have to be arranged, which might not be then available on a 12 hour basis. Some adjustment must be made for that. Mr Hart did not give an amount specifically for, say, a six hour shift but Ms Robertson's rate of \$26.50 for a six hour shift can be used. If for example, every tenth day could only be worked with one 12 hour and two six hour shifts, then the difference over a 10 day period would be about \$108 or \$10 per day. (It is not necessary to make that adjustment for the period of the next eleven years, i.e. before the regime of two 12 hour shifts). With that qualification I am satisfied that the market costs are according to the QLS rates which I will apply.
- [77] I will not attempt to dissect from those rates amounts which represent the QLS profit margin. In this case the defendant has not sought to show that Christopher's needs could be met by paid carers who are not found through an agency such as QLS and whose rates, as a cost to the client, would be less than the QLS rates. The wages paid by QLS to its employees are known. But the relevant figure is the cost to the client. It is inappropriate to assess Christopher's needs on the basis that he has them met by people he engages without the assistance of an agency. He will need the support of an agency. That is why the assessment should be on the basis of a regime of managed care.
- [78] To what extent has the necessary care for Christopher exceeded the hours of care which Christopher would have required absent his cerebral palsy? The evidence and submissions descend to great detail in discussing what Mr and Mrs Hills have done for Christopher and how long it has taken. For example there was a thorough examination of whether the showering of Christopher took 20 mins and his feeding 90 mins per day, as Ms Stephenson had been told, or instead 45 mins and 180 mins per day as they said in evidence. There were many instances in which their evidence differed from their particulars (given last year) as to the time involved in such activities. Generally their evidence tended to give a higher estimate of time than that which was in the particulars and they were strongly challenged about those differences. I doubt that it is possible let alone productive to make findings in relation to each activity, and thereby judge whether their evidence was exaggerated or whether instead they had not been careful enough in providing information to Ms Stephenson or to Christopher's lawyers for the particulars. On any view these are all estimates rather than precise measurements and the required time will vary with the circumstances, such as what it is that Christopher is eating. The preferable approach is to start from the position that Christopher has required the attendance of someone on a 24 hour basis and then to subtract some estimate of what would have been required had he not been disabled but he had the requirements of a child with type 1 diabetes. That approach is imprecise but it is a better approximation of the relevant need for care than some detailed assessment, item by item, based upon

estimates of specific times spent in specific activities, which is more likely to produce a result which does not fairly represent the relevant need.

- [79] The defendant argues that any child has no capacity to care for himself before the age of 4 and that I should allow nothing for that period. That was the view of Donovan AJ in *Rotumah*, who acknowledged that “deciding the cut off point is, to some extent arbitrary”.<sup>9</sup> The defendant then argues that I should assume that from age four until Christopher’s present age of 10, Christopher’s need for ordinary parental care has gradually diminished. Ultimately the defendant says that I should allow an average of seven hours a day of (compensable) care from age four to the present.
- [80] Had Christopher not been disabled, nevertheless his required care would have been higher for the fact of his diabetes. By now he would be able to manage that for the most part by himself. But an able 10 year old child still requires daily care and some deduction from his future care claim must be made on that account. A reasonable assessment would be as follows. Until age four, he would have required full time care anyway so there should be no allowance for that period. Between the ages of four and his present age, an average of 17 hours (24 hours reducing over time to 10 hours) should be adopted, resulting in an average of seven hours per day as the care required as a result of his cerebral palsy. For the future I would allow for 10 hours of required “parental” care at present, falling to 0 by age 14, which is an average of 2.5 hours per day over the next four years.
- [81] It follows that for the next four years I would allow future care of 21.5 hours per day and a mix between paid and unpaid care according to Mr Hart’s first model. For the seven years after that, I would assess on the basis of that model but with the relevant need being 24 hours per day. And as the defendant concedes, I should assess on that 24 hour basis from aged 21.
- [82] Mr Hart suggested that about once a month the paid carers would work the equivalent of one extra shift at \$211 to give the family some respite. That is a realistic assumption which affects the apportionment between paid and unpaid care which is necessary because of *Mott* but which does not otherwise affect the assessment because unpaid care should be allowed at the same rates.
- [83] The QLS rates for Mr Hart’s first model amount to \$2,020 per week for rostered carers plus \$86.54 (\$4,500 per year) for training, a total of \$2,106.54 per week. To that should be added one extra shift of \$211 per month or about \$50 per week. Paid care for the next 11 years (until shortly after Christopher turns 21) should be valued then at \$2,156.54 per week for 11 years and discounted at five per cent which equals \$957,504.
- [84] What should be allowed for unpaid care? I will assess this by the difference between the cost for paid care under Mr Hart’s first model and the cost under his second model. In each case, as the defendant accepts, there should be an allowance of \$4,500 per year for training. The comparison for an ordinary week is then between 98 hours for a total of \$2,020 and 175 hours (14 x 12 hour shifts plus an extra one hour per day) for a total of \$3,157, a difference of \$1,137 per week. Another \$10 per day or \$70 per week should be allowed for the likelihood of some

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<sup>9</sup> At pages 34-35

disruption of the 12 hour shifts under the second model. So the extra which an agency might be expected to charge for the hours when under Mr Hart's first model, there would be no paid carer, is about \$1,200. That provides an appropriate measure for the care which instead will be provided on an unpaid basis, I am assuming, for the next 11 years. At least from the point when there is no element of normal parental care (four years from now) this represents unpaid care of a total of 70 hours per week or about \$17.14 per hour. That is not, of course, to value the unpaid care at less than the paid care but simply to say that all of the care should be valued at the commercial cost of supplying all of it, a cost which diminishes as an hourly equivalent as more hours become involved. For the next four years, when an allowance should be made for an average of 2.5 hours per day or 17.5 hours per week for usual parental care, the gratuitous component would be 52.5 hours per week at that rate of \$17.14 per hour, amounting to about \$900 per week. For each week of unpaid care must be deducted the extra \$50 for paid care from Mr Hart's suggested additional shift every month. This means \$850 per week for unpaid care for the next four years and \$1,150 per week for the seven years after that.

- [85] Subject to any discount for contingencies, the reasonable value of Christopher's need for future care should therefore be assessed as follows:

For the next four years

Unpaid care:

\$850 per week for four years discounted at 3 per cent = \$167,450.00

Paid care:

\$2,156.54 per week for four years discounted at 5 per cent = \$409,742.00

For the following seven years (to about 21)

Unpaid care:

\$1,150 per week for seven years discounted at 3 per cent  
and deferred for four years = \$337,185.00

Paid care:

\$2,156.54 per week for seven years discounted at 5 per  
cent and deferred for four years = \$548,223.00

Beyond age 21

(As per Mr Hart's evidence for his second model)

\$169,227 per year or \$3,254.37 per week plus \$70 per  
week (for disrupted shifts) = \$3,324.37 per week for  
33 years discounted at 5 per cent and deferred for 11  
years = \$1,663,857.00

Total \$3,126,459.48

- [86] I will mention now a point concerning the computation of a multiplier which Professor Strauss raised. He compared the computation of the multiplier according to an actuarial method with that according to what he described as the expectancy method. Under the latter method it is assumed that the plaintiff will live to exactly his life expectancy and a multiplier is then calculated according to the appropriate discount rate. Under the former method, actuarial calculations are made according

to the plaintiff's probability of survival year by year. The example given by Professor Strauss is a plaintiff with a life expectancy of 20 years because he is within a cohort in which half the people will not survive for than a day and the other half will live exactly 40 years. The average life expectancy is 20 years which would on the five per cent tables provide a multiplier of 666. But the average of the multipliers for 0 years (therefore 0) and 40 years (918) is only 459. He said that the actuarial method provides a more logical and fairer method of calculating a plaintiff's loss. That may well be so, and the point is not a new one in Australia as the discussion in Luntz *Assessment of Damages for Personal Injury and Death* (4<sup>th</sup> ed) [6.2.1] to [6.2.5] shows. But the point is not to be determined in this case, because both parties have proceeded upon the basis of the expectancy method, although the defendant argues that the use of the more generous expectancy method should make for a more conservative approach to the assessment of this plaintiff's future losses. That argument however has not affected the outcome for the assessment of future care, or any other component within this award.

- [87] The defendant then says that any calculation of the cost of future care requires a discount for contingencies and of the order of ten per cent. The contingencies to which it refers are that Christopher's parents might continue to actively care for him beyond 21, full time paid care might be feasible upon the cheaper 24 hour shift basis and that it might be necessary for Christopher to be cared for in an institutional setting such as a nursing home, which would be less expensive.
- [88] That first contingency assumes a different valuation for professional care from unpaid care. But as I have already discussed, there should be no such difference in this case. In *Winterton v Mercantile Mutual Insurance* [2000] QCA 249, an assessment of the cost for future care was varied upon appeal by discounting for the contingency that the plaintiff would be cared for gratuitously. The plaintiff in that case was then aged 18 and the possibilities for her future care were effectively two models each involving paid care, and the provision of unpaid care by others including her grandmother who was then 71 and in poor health. The trial judge had assumed that the care would be the more expensive of those (paid care) models and had discounted the award by 25 per cent for the fact 'that the need for such care was not imminent, given the grandmother's involvement'. The Court of Appeal varied that by averaging the costs of the two models and then discounting the resultant amount by 15 per cent for the prospects that there would be some further care from the grandmother and other contingencies, which seemed to include the provision of unpaid care by others. The judgments contain no discussion of why, on the facts of that case, the value of the gratuitous services would be less than that of the professional services (except that the former included the grandmother's services and she was old and frail). I accept that the judgments indicate the necessity to appropriately discount an assessment based upon the cost of professional care according to the relative likelihood that instead the plaintiff would receive care which was not only unpaid but also less valuable. I do not accept that *Winterton* is authority for the proposition that as a general rule, the assessment of unpaid care should be less than that of paid care where the nature and quality of the services is identical between the two.
- [89] As for 24 hour shifts, Mr Hart's model for them is costed at \$371.50 per shift or \$2,600.50 per week, to which training would have to be added. The difference between two 12 hour shifts and one 24 hour shift, before other things such as training are to be added, is \$50.50 per day (2 x \$211 less \$371.50) or about \$350 per

week. When training and other adjustments (such as disruptions to shifts) are considered, the saving from a change to a 24 hour shift would be between 15 and 20 per cent. But the prospect that a 24 hour shift would become feasible is small. A 24 hour shift would involve the carer sleeping through the night at Christopher's house, but it would be arduous. In my view a 24 hour shift would place a burden upon the carers which most would find unreasonable. Still, some allowance might be made for it.

- [90] It is conceivable that Christopher would be cared for in an institutional setting at some time. It is more likely that that would occur relatively late in life so that its impact on the overall cost of future care measured in present terms would be small.
- [91] Two of the contingencies relied upon by the defendant are therefore relevant and warrant a reduction but only, in total, of five per cent.

### **Tax rebate on future care**

- [92] The defendant argues that the component for future paid care should be reduced because it is likely that Christopher will have the benefit of a rebate of income tax because of the expense of his care. Under s 159P of the *Income Tax Assessment Act 1936* (Cth), a taxpayer is entitled to a rebate for medical expenses, which are defined to include payments as remuneration of a person for services rendered by him as an attendant of a person who is permanently confined to a bed or an invalid chair. The Commissioner of Taxation has issued a ruling<sup>10</sup> to the effect that the expression "attendant of a person" requires that the services provided by that person be "primarily to assist the person with their personal care, for example bathing, washing, dressing and feeding." The Commissioner's view is that fees paid to a care agency will not in their entirety be "medical expenses" because there must be deducted any part of that payment which represents the administrative cost of the agency. Whether or not that view accords with the statute, it is sufficiently clear that most of anything which Christopher will pay to a care agency will constitute "medical expenses", so that according to the present law, he will be entitled to a rebate in respect of them. The effect of s159P (3A) is that he would be entitled to a rebate of income tax in an amount 20 per cent of the excess of his medical expenses over \$1,500. There is therefore a potential for a substantial rebate, depending upon the extent of Christopher's income tax liability and the extent to which his care is paid care.
- [93] The defendant then refers to evidence from Mr Gallagher, an employee by Perpetual Trustees Queensland Ltd, who was called to give evidence of the costs of managing the investment of Christopher's award. In that context, it was relevant for Mr Gallagher to speculate about Christopher's likely investments and income. He suggested there would be an income of five per cent on the award. On that premise, and assuming that the income was assessable income and was not offset by substantial deductions, the result would be that Christopher would have a tax liability which would be more than 20 per cent of the cost of attendant care, at least before he has used up much of his capital, and assuming that his care is paid care. So it is said that the true cost of paid care will be substantially reduced, as should be the award for future care.

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<sup>10</sup> ATO Interpretative Decision 2003/319 – Income Tax Medical expenses tax offset: payments for domestic services

[94] This is the same argument which was put in *Theden v Nominal Defendant* [2004] QSC 310 where the trial judge, Jones J, rejected it because he said the evidence in that case did not show that the plaintiff was likely to receive a taxable income. But his Honour added:

‘[122] The plaintiff has virtually no capacity to earn income from personal exertion. There is no evidence of her receiving taxable income from investments. I am not sure on what bases the defendants contend that the plaintiff will have a future liability to pay income tax. If I am asked to assume that she will invest part of the damages to be awarded in this judgment, then that is something I cannot do. From the third of the “fundamental principles” identified by Gibbs CJ and Wilson J in *Todorovic v Waller*, the Court has no concern with the manner in which the plaintiff uses the sum awarded; the plaintiff is free to do what she likes with it.’

[95] That conclusion was upheld on appeal at: [2005] QCA 236, where Muir J, with whom McMurdo P and Wilson J agreed, said at [74] – [75]:

‘[74] I agree with the primary judge that the argument under consideration rests more on speculation than on fact. The argument raises an important point of principle, but in my view, it would be inappropriate to deal with it in the absence of a surer factual foundation. The argument was advanced in the abstract at first instance. There was no exploration of how, if at all, the respondent intended to invest her damages award let alone of what the probabilities were in that regard. There was no evidence or consideration of ways in which such investments could be made through the use of superannuation, allocated pensions or the like, so as to minimise the incidence of income tax. Nor did the argument address the prospect that the respondent may seek to enhance her capital through capital gains or other tax beneficial avenues.

[75] The point also raises a significant public policy consideration, namely the desirability of exposing defendants, in a substantial way, to the risks arising from the possibility that benefits of the nature of those under consideration may be varied or withdrawn from time to time. That is an added reason why it should be determined in the light of an appropriate factual investigation and findings.’

[96] The defendant says that this case is different from *Theden* because the evidence here does show the likelihood of a large taxable income and in turn a large enough tax liability to allow for a reduction of the cost of future care by the amount of the rebate: 20 per cent.

- [97] But the facts are not so clear as the defendant's argument would suggest. Undoubtedly Mr Gallagher's view is that Christopher will be likely to make a return upon the investment of his award which will result in a substantial taxable income. Mr Gallagher's opinion has some weight because of the prospect that Perpetual Trustees will be appointed as the trustee of this award until Christopher turns 18. But after Christopher turns 18, he will not require a trustee and Mr Gallagher's evidence is less relevant for that period. Moreover, there is the contingency that he might not choose to have paid care. I am assuming that he will have a certain amount of paid care until age 21 and thereafter that all of his care will be paid care, as a means of assessing the value of his need for services. But whilst that is the most likely scenario, it is not certain that he will have even most of his care needs provided on a paid basis.
- [98] The defendant then points to evidence from Mr Hart as to what a carer would be paid by QLS under the care models which I have accepted. Under the model relevant to when Christopher turns 21, it is said that the tax rebate would be \$8,758 (\$168.42 per week) and under the model from aged 21 the rebate would be \$18,628 (\$358.23 per week). It is submitted by the defendant that these amounts should be deducted in the calculation of the cost of future care. The defendant's argument suggests that there is a certainty, when instead there are contingencies. Accordingly it would not be appropriate to deduct *all* of those assumed weekly amounts in calculating the component of future paid care. But in any event, it is not appropriate to deduct *any* such amount, because in my view that would be inconsistent with principle.
- [99] Again, the loss is from the need for care services, and that is measured by the reasonable value of those services. There is a loss for which damages will be awarded regardless of whether the plaintiff has that need met by paid care or by gratuitous care. And where the need is met by paid care, the actual cost to the plaintiff is not the measure of his loss. If he pays nothing for the care, ordinarily his loss is still the value of the care which ordinarily is measured by its cost in the market. If he pays either less or more than the market cost, still ordinarily his loss is measured by the market cost. His loss is not measured by the cost to him, having regard to his subjective circumstances, but instead by the value, objectively assessed, of the services which he needs: *Van Gervan v Fenton* (1992) 175 CLR 327 at 331-334. But the defendant's argument would measure his loss not by the objective value of the required services, but by the actual net cost to him of those services in what are said to be his likely subjective circumstances. The availability of the tax rebate is according to the plaintiff's circumstances and how they are affected by the arrangement for his care and his finances. It follows that for this reason at least, the argument for a reduction of the award for future care as a result of the prospect of a tax rebate should be rejected.

#### **Future care assessment**

- [100] For these reasons the award for future care should be \$3,126,459.48, which reduced for contingencies by five per cent, results in \$2,970,136.

#### **Past care**

- [101] As discussed at paragraph [80] this component should be allowed at seven hours per day from Christopher's fourth birthday. And as also discussed, in this case the

gratuitous care has the same value as paid care and should be assessed at market rates. The QLS 12 hour shift at \$211 equates to \$17.58 per hour, and its 24 hour shift at \$371.50 equates to \$15.47 per hour. I will allow \$16 per hour for 6.25 years which is \$255,500. I will allow interest at four per cent for 6.25 years which amounts to \$63,875.

### **Loss of earning capacity**

- [102] As a result of his cerebral palsy Christopher has no earning capacity. On his behalf it is argued that he should have an assessment of between \$566,000 and \$596,000 for lost wages together with further funds for lost superannuation and long service leave payments.
- [103] His claim for lost wages is based upon the evidence of Mr Maynes, a chartered accountant, who has done calculations based upon three alternative levels of income, which are those of practising solicitors, human resources managers and average weekly earnings. Under the solicitors' alternative, he assumed casual employment from age 18 as a law clerk at a clerical rate of pay and from age 23, average weekly earnings for that occupation. For the human resources manager alternative, he assumed some part time employment whilst Christopher would be completing the necessary tertiary studies and from age 22, he used the average weekly earning for that occupation, again. The third alternative assumed average weekly earnings from age 18 as published by the Australian Bureau of Statistics. Under each of these three alternatives, he assumed that Christopher would have worked part time from the age of 15 to 18. There is no challenge to Mr Maynes' arithmetic or to the accuracy of the data which he has used. The arguments concern the assumptions upon which the loss should be calculated.
- [104] The defendant argues that there is no reason to assume that Christopher would have derived an above average income, and points to the evidence that Christopher's IQ is, broadly speaking, average. Against that however, Mr and Mrs Hills place a high priority on the education of their children and Mr Hills has tertiary qualifications and Mrs Hills is presently pursuing a nursing degree. Mr Hills has given up his work to look after Christopher and in particular to help him for some hours each day with his home schooling. Especially given the high priority which they place upon education, it is more likely than not that Christopher would have undertaken some tertiary study which provided some particular qualification for employment.
- [105] But that is not to say that probably his income would have been higher than average weekly earnings, measured over his entire working life. As Mr Maynes' calculations show, there is not much difference between the loss measured under his human resources manager model from that based upon average weekly earnings, because the above average earnings for that particular occupation are derived only after a period of tertiary study (in which the part time earnings are well below average full time earnings). Upon the assumption that Christopher would have worked until he turned 65, his loss under the human resources manager model is calculated by Mr Maynes as \$569,451, and his loss under the average weekly earnings model is calculated at \$549,058. The difference is less again if the calculations assume a shorter working life. Mr Maynes' calculation upon the solicitor model results in a loss of \$671,054.

- [106] The argument ultimately advanced for the plaintiff is that I should assess this component by averaging the amounts under those three scenarios, which results in \$596,521. I do not see the logical basis for that argument. There is no circumstance which points to a particular likelihood that Christopher would have worked as a solicitor or as a human resources manager.
- [107] In all probability, his earnings for much of his working life would have exceeded average weekly earnings across all occupations, because most probably he would have obtained a tertiary qualification. But beyond that it is not possible to say that he would have pursued a particular profession or derived a certain level of income. And of course, it is possible that his earnings as a graduate might have been less than average weekly earnings. For example Mr Hills has worked as Minister of Religion, and in other occupations involving the church, from which his earnings have been modest and certainly less than average.
- [108] The assumed earnings of a human resources manager in Mr Maynes' calculations are net weekly earnings of \$647.38 from aged 22 to 24, \$946.39 for the next five years, and thereafter a little over \$1,100. Those amounts are to be compared with the average net weekly earnings of \$813.65. The human resources manager model provides a reasonable measure, because it represents some increase above average earnings, but after a period of lower earnings during tertiary study, which is appropriate because of the likelihood that Christopher would have obtained a tertiary qualification of some kind.
- [109] The defendant challenged Mr Maynes' use of \$813.65 as average net weekly earnings, saying that the figure should be instead \$779.60 which comes from the ABS figure for "full time adult ordinary time earnings". The difference of \$34 per week (overtime earnings) is not significant for present purposes, and does not affect the relevance of Mr Maynes' human resources manager model. But in any case I would reject the argument that for some reason I would ignore what would have been capacity to earn overtime.
- [110] The defendant also challenges the assumption that Christopher would have worked (part time) while still at school. In this respect, Mr Maynes has made the same assumptions under each of his three models. He has assumed that from age 15 until the end of his schooling two and half years later, Christopher would have worked eight hours per week during school terms and 38 hours per week during holidays (save for four weeks of holidays). He has used the published data for casual employment in retail industries for the relevant age groups. The defendant argues that I should not assume that Christopher would have done any of this work. In my view the assumption is a realistic one and should be adopted. The total amount in question for these school years is \$10,667.
- [111] The submissions for the plaintiff appear to accept that there should be a discount of five per cent for contingencies. The defendant argues for a 20 per cent discount, especially having regard to Christopher's diabetes. I accept the plaintiff's argument based upon the evidence of Dr Jack, that Type 1 diabetes sufferers are likely to have the potential complications from diabetes met with good management. But, that diabetes is a matter which must be given some weight in fixing an appropriate discount. In my view it is appropriate to discount by 10 per cent for contingencies.

- [112] There must be some reworking of Mr Maynes' calculations having regard to Christopher's likely lifespan of 54 years. Had he not had cerebral palsy it is reasonable to assume that he would have worked to age 60. His loss is then measured by computing the lost earnings to age 54 and then adding the relatively small amount to compensate for the six years from age 54. Mr Maynes' calculation includes a component of \$136,112 for 20 years from 6 June 2041 (Christopher's 45<sup>th</sup> birthday). For that I will substitute that same weekly loss for nine years, for which the multiplier is then 68.9, resulting in \$78,078.94 for these years and a total (to age 54) of \$511,418. After a discount for contingencies of 10 per cent, the figure is \$460,267. To this should be added some allowance for the "lost" six years from age 54<sup>11</sup>. On the basis that after deducting expenses the loss here is effectively 25 per cent of after tax earnings of \$1,133.32 per week, this results in a further component of \$8,975 which after a 10 per cent discount for contingencies is \$8,078.
- [113] For the plaintiff it is argued that there should be a further allowance representing long service leave. It is said that this has a value for present purposes because of the potential for an employee to have the monetary benefit of that entitlement whilst working at the same time in a new job. The plaintiff's argument relies upon *Simpson v Diamond* [2001] NSWSC 925 as authority for the proposition that there is no element of double counting in this. The defendant argues otherwise. Ultimately this argument concerns a claim \$2,000. That results from a calculation, over a notional working life of 47 years, of a total of 40.7 weeks of earnings which when discounted would yield \$2,251.85.<sup>12</sup> The argument allows 10 per cent for contingencies. But that understates the prospects that the employee would not accrue long service leave in many or most of his jobs, or that he would be paid it when he is not working elsewhere. I will not allow anything extra upon this basis.
- [114] There must be an allowance for superannuation. Mr Maynes has done some calculations based upon his three scenarios, assuming the employer's contribution is nine per cent of gross earnings. He has deducted 15 per cent from those contributions for the tax on these contributions entering a superannuation fund. He made no allowance for tax on exit from the fund, but no such allowance should now be made because of recent changes to the tax laws. His calculations allow nothing for the growth in an employee's superannuation benefit from investments made by the fund and in that sense they are conservative. Based upon his human resources manager model, there is a loss of \$56,533 to age 60. Discounting this by 10 per cent for contingencies, the figure becomes \$50,879.
- [115] Accordingly, the assessment for lost earning capacity is as follows:

Lost wages and salary to age 54	=	\$460,269.00
Allowance for age 54 to 60	=	\$8,078.00
Superannuation	=	\$50,879.00
Total		<u>\$519,226.00</u>

<sup>11</sup> *Skelton v Collins* (1966) 115 CLR 94

<sup>12</sup> On the assumption of average weekly earnings

### House modifications

- [116] The plaintiff claims \$202,042 for the cost of house modifications which are required because of his cerebral palsy. The claim has two components. The first is for the capital cost of modifying his parents' house in Toowoomba, for which \$80,061 is claimed. The second is for the additional capital cost of modifying a house for when he lives independently from his parents, for which \$121,981 is claimed.
- [117] For the most part there is no controversy as to what modifications are reasonably required for his present or future house. But there are competing arguments as to the cost of modifications, in which the plaintiff's case relies upon the evidence of an architect, Mr Deshon, and the defendant's case relies upon the evidence of a quantity surveyor, Mr Leck.
- [118] Mr Deshon details the modifications which he says are appropriate to the Hills family house, and the occupational therapist Ms Stephenson expressly agrees with those recommendations. She also recommends the installation of a ceiling hoist between Christopher's bedroom and bathroom (in addition to the mobile portable hoist which Christopher will need in other areas of the house as well as for outings). Mr Deshon has costed these modifications to a total (with GST) of \$65,981, to which he then adds \$14,080 for the cost of installing air conditioning throughout the entire house.
- [119] As to air conditioning, in her report of 4 May 2005 Ms Stephenson wrote that "Christopher requires air conditioning in his bedroom to facilitate better sleep: he becomes cold after having kicked off his bed cover, especially when he is wet, but is unable to pull the blanket up again." But Mr Deshon has costed the installation of air conditioning throughout the house. It is not demonstrated that Christopher's condition requires that installation. There is no medical recommendation for it. I will allow \$1,000 for air conditioning his bedroom.
- [120] I go then to the major differences between Mr Deshon and Mr Leck about the present house. I should first note that Mr Deshon's figures for individual items are net of GST whereas Mr Leck's are not.
- [121] Mr Deshon allows \$6,900 for raising and extending an existing carport. Mr Leck allows \$3,000 for what he says is the more practical course of a new carport. I accept Mr Leck's view about that. Mr Deshon allows \$9,000 to construct a veranda and a ramp at the rear of the house, for which Mr Leck estimates \$5,000 but says that he is uncertain because of the absence of a specific design. Mr Deshon probably has a more specific design in mind and I accept Mr Deshon's estimate. Mr Deshon provides for a conversion of the existing bathroom to an ensuite for Christopher and the construction of a new family bathroom, all of which would cost \$23,500. Mr Leck has allowed \$18,000. Again I favour Mr Deshon's view because his estimate is based on what must be a better understanding of the design. Mr Deshon allows \$4,000 for work in the kitchen, to create knee space under cupboards apparently in order to enable Christopher to use working spaces of the kitchen. That is not appropriate in Christopher's case where he would not be using the working spaces of the kitchen. Mr Deshon allows \$1,750 for replacing various taps, switches and handles, for which Mr Leck's estimate is \$1,400. But I accept the defendant's argument that it isn't shown why these changes are apt given that

Christopher has no functional use of his hands. Mr Deshon allows \$2,400 for smoke and intruder detectors. But he said that smoke and intruder detectors which would be appropriate in the average house would cost \$800. I will therefore allow \$1,600.

- [122] There are still further differences between these two witnesses, which were debated in cross examination and in some detail in the submissions (although in one case the argument concerns \$150). But the items already discussed involve a reduction in Mr Deshon's estimates by \$10,450 to which should be added GST (10 per cent) and fees (15 per cent) making a total of \$13,062 to be deducted from Mr Deshon's total of \$65,981. With the additional of \$1,000 for air conditioning, the sum that should be allowed for modification to the existing house is \$53,919.
- [123] It is agreed that Christopher should be allowed the cost of modifying a house for his own occupation as an adult. The plaintiff's case is that he will live independently from aged 18. For reasons already discussed in relation to his need for care, I will assume that he lives independently from aged 21. An occupational therapist, Ms Elmer, says that Christopher will require a wheelchair accessible house with an open plan bedroom and ensuite bathroom. Ms Stephenson says that he should have accommodation for a carer in his own home. She says this is necessary "for privacy of both the carer and Christopher"<sup>13</sup>. But Ms Stephenson there had in mind a live in carer. I have concluded that his need for care should be valued on the more expensive premise of the carers working shorter shifts and not sleeping overnight. Accordingly I will not assume a dwelling with separate carer's accommodation.
- [124] Mr Deshon originally assessed this component as follows. He calculated the cost of acquiring and modifying an existing house at \$321,299. This includes \$155,200 for the acquisition of an existing house and the acquisition costs. The cost of modification is \$150,999, to which he added GST, making for a total of \$166,099. He assumed that this acquisition and modification will be made now, rather than at the time when Christopher will leave home. So he then assumed that until then the house would be rented, and at \$5,000 per annum, which he deducted to reach what he said is an estimated "capital" cost. To those modification costs he would add a further \$14,040, again for air conditioning the entire house. For the same reasons I do not think that air conditioning other than for Christopher's room should be allowed.
- [125] The assumed rental from this house should be ignored firstly because it is not a capital item, but also because it is more appropriate to assume that a house will be acquired and modified, or alternatively an appropriately designed new house will be built, as Christopher reaches age 21. That capital cost would then be discounted for the fact that the expenditure is deferred for 11 years.
- [126] Mr Leck's approach was to assess the extra cost of a project home to be built which would incorporate the features which Christopher will require. Mr Leck referred to a particular project house marketed by Dixon Homes and said that the extra cost of construction should be about \$19,580. Deferred for 11 years that amounts to \$11,454 which the defendant argues should be reduced to \$10,000 for contingencies, including the possibility that Christopher will remain with his parents after aged 21.

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<sup>13</sup> Her report of 9 November 2005 page 16

- [127] There is a problem in Mr Deshon's methodology because he is assuming certain changes to a hypothetical house, the particular design and construction of which is uncertain. That is a different thing from assessing the appropriate modifications to an actual house, such as the Hills' present house, or a proposed house of defined layout, dimensions and materials, such as the Dixon house. Some of the modifications which he then quantifies are those which I have disallowed in relation to the present house. They include the replacement of taps, switches and handles (\$1,750) and the full cost of smoke and intruder detectors (rather than the extra cost of \$1,600). On its face, Mr Leck's approach seems more logical. And it is likely that the extra cost of construction of a new house to make it meet Christopher's needs would be less than the more complicated exercise of making major alterations to an existing house. (Conceivably the alteration of an existing house could be more economical if the cost of vacant land was relatively high. But that point was not explored in the evidence.)
- [128] Mr Leck's calculations assume that a suitable allotment could be purchased for \$100,000 to which would be added the quoted price of the "Lyndon" house marketed by Dixon Homes, which is \$84,094. Mr Leck's assessment of the further costs of construction of a modified "Lyndon", is \$20,380. That figure includes \$2,400 for smoke and intruder detectors, about which the defendant says that only \$1,600 should be allowed. Hence the defendant's ultimate argument that the figure should be \$19,580 and then deferred for 11 years.
- [129] In his most recent report<sup>14</sup> Mr Deshon made an assessment of the additional costs of a purpose built home for Christopher. He said there, in effect, that the additional costs would amount to \$92,686<sup>15</sup>. The defendant says that this estimate has no utility because Mr Deshon has not provided evidence of what the same house would cost for a person without the modifications, so it is said that the assessment is unreliable. And the defendant points to a number of items assessed by Mr Deshon which are said to be necessary in a house for people without Christopher's disability.
- [130] Significantly, Mr Deshon's figure includes \$32,260 for work which includes "enlarge floor area to accommodate carer's quarters" as well as "wider corridor, bigger bedroom one and ensuite bathroom, kitchen/laundry, store". The total estimated for all of this is \$32,260 of which the carer's quarters must be a significant proportion. He includes \$5,000 for a single carport but a double carport is already allowed in the (unmodified) cost of Mr Leck's house. \$4,700 is included for various taps, switches and handles and cabinet work which, as already discussed, should not to be allowed. Then he costs other items which seem to be required in an average house, such as landscaping, fences and gates, council permits and the cost of professional fees. Overall, I do not accept that the analysis by Mr Deshon provides a reliable estimate of the cost of modifying, a new house, and in particular the project house addressed by Mr Leck.
- [131] On the other hand Mr Leck's assessment is not entirely persuasive. It would have been more persuasive if supported by evidence from Dixon Homes that indeed it

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<sup>14</sup> 31 March 2006

<sup>15</sup> At page 7 of his report of 31 March 2006, the modifications appear to be the items numbered 5 to 19 inclusive, which total (\$82,760), but are shown in the report as totalling \$84,260 which with GST is \$92,686

would build the modified “Lyndon” for the price which Mr Leck has estimated. The particular house chosen by Mr Leck is relatively small and a better assessment might have resulted from assuming a bigger house. I was pressed with arguments as to the published data for the size of new houses, from which it appears that only a few per cent of new homes are of this size. I am persuaded that something more than Mr Leck’s assessment should be allowed, firstly because the “Lyndon” is small (when it is considered that the accommodation of Christopher with his numerous items of equipment and aids requires more than the average space needed by a sole occupant), and secondly, because I am not satisfied that the project home builder would be prepared to build such a modified house for that cost. In my view, a more realistic assessment is \$40,000. This is still less than the assessment I have made for modifying Christopher’s present home, but as I have said, the modification in a house to be built should be cheaper. The present value of \$40,000 deferred for 11 years is \$23,388. I am asked to discount that for contingencies, including the possibility that Christopher may remain with his parents. But those contingencies include, for example, a move by the Hills family to another house where the alteration cost, or the extra cost of building a new house, would be comparable. With the presence of carers on a full time basis, as I have assumed in the care claim from the time Christopher is 21, and with the various items of equipment which Christopher should have where he lives, I think it is unlikely that if he remains living with his parents beyond 21, they would stay in the relatively small house which they now occupy. I will not discount this component for contingencies.

- [132] I assess this component of house modifications at \$77,307 (\$53,919 plus \$23,388).

### **Hydrotherapy**

- [133] There is a demonstrated need for Christopher to be involved in regular exercise programs and in particular regular hydrotherapy exercise. The defendant agrees that Christopher must have regular hydrotherapy. Ms Stephenson said that from age 17 Christopher should undertake 30 minutes per day of stretching and participate in one session of hydrotherapy per week. Mr Egan, a podiatrist, gave evidence of the benefits of hydrotherapy in the reduction of contractures, improvement of mobility, improvement of weight bearing activities and increase of range of motion of certain upper limb joints. Dr Kennedy said that Christopher should have daily stretching and regular hydrotherapy although on one view, he was not saying that he must have daily hydrotherapy. But he said that Christopher would be more likely to have hydrotherapy as part of his daily exercise if he could do so at home rather than having to go to a public facility. Ms McNamee, an occupational therapist who gave evidence in the defendant’s case also spoke of the benefits of hydrotherapy upon a regular basis.
- [134] The issue is whether the award should include the cost of building and maintaining a pool at Christopher’s house for his hydrotherapy, or whether Christopher’s need could be met by the facility available to the public in Toowoomba, which is at the Milne Bay Aquatic Centre. It has a hydrotherapy pool which has a chair lift and hoist. The Cerebral Palsy League conducts a group session at the pool once a week and the centre is within five minutes drive of the plaintiff’s house. It is a heated pool, is under cover and is used all year round. There is a small cost for the use of that facility. The hydrotherapy which Christopher could undertake at that centre would be equal to that he could undertake in his own pool. But the ideal situation would be for Christopher to have a pool at the house where he lives. He would not

have to be transferred to and from the aquatic centre and he could change his clothes in his own house. He would not have to book the centre for particular times and keep to that arrangement. On his behalf it is submitted that the task of attending an aquatic centre for the rest of Christopher's life would be "grossly arduous, embarrassing and inconvenient" but I think the difference is better described as one for convenience.

- [135] The medical evidence does not establish that it is necessary that Christopher have daily hydrotherapy. Undoubtedly it is necessary for him to have regular exercise and hydrotherapy is a beneficial form. But I am not persuaded that he needs to or is likely to undertake hydrotherapy on a daily basis. To this point in time, he has had no hydrotherapy, notwithstanding the availability of the aquatic centre and the small costs involved.
- [136] I accept that it would be more convenient for him to have his own pool. But the public facility would be equally effective and it should meet his health needs unless it became so inconvenient that he would not use it as often as he should. He will have at all times a carer who will be able to drive him to the centre and help him use that facility. There is a lifeguard on duty there always. I do not mean to underestimate the enormous burden of Christopher's disabilities in his everyday life when I say that the particular activity of using the aquatic centre should not be described as "grossly arduous" or "embarrassing". As I have said, this centre is used by many other persons with cerebral palsy. In my view, Christopher's need for hydrotherapy can be well met by the use of the centre and if things remain as they are, it does not require the construction of a hydrotherapy pool at the place where he is living.
- [137] The cost of the construction and ongoing maintenance of the pool is not in dispute. The cost of installing a hydrotherapy pool at Christopher's present house is \$94,820 and the deferred cost of installing a pool when he lives independently is \$64,193 (\$94,820 deferred for eight years). If that cost is deferred to age 21 rather than 18, the cost is \$55,441. The future running costs for a pool amounts to \$73,225 and the equipment replacement costs a sum of \$33,265. In this context it is apt to refer to what Barwick CJ said in *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649 at 662, that in assessing whether the relevant benefit is *reasonably* required, it is relevant to ask what a person, "(assuming) he was spending his own money and assuming that he had sufficient to do as he would and was well advised and reasonably careful for his own welfare, would be likely to expend in protection of himself and his condition"<sup>16</sup>. The cost at the aquatic centre is \$3.30 per visit plus \$1.40 per visit for the carer. A 20 session pass is available for \$56. The centre is operated by the Toowoomba City Council and at least at present, there is ample time available for its use by disabled persons. The pool used for hydrotherapy is one of several pools there. There is a ramp used for wheelchair access to the pool and wheelchairs are available at the centre. There are change rooms designed for use by disabled persons. The defendant concedes that an allowance of \$20 per week would cover the cost of the use of that facility. Over the next 44 years that would be \$18,880. There is also a cost in travelling to the centre. The defendant concedes that overall, \$20,000 should be allowed.

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<sup>16</sup> cited in *Theden v Nominal Defendant* [2005] QCA 236

- [138] There is a chance that the centre will not always be available for Christopher's use. Over a period of 44 years, it is possible that what is now a publicly funded facility would cease to be so or that it would become less convenient for Christopher so that it would not be a practicable option. Christopher might not always live in Toowoomba or near to an equivalent facility. For these contingencies some allowance should be made for the cost of installing and maintaining a pool, although well into the future. The cost of construction of a pool, deferred for say 20 years would be \$35,737 and the future running costs and equipment replacement costs, quantified by Mr Deshon at \$106 per week would for, say, 24 years from age 30 amount to \$29,484. Against the contingency of costs of that order (with some savings of the costs of the public facility), it is reasonable to allow a further \$20,000. The result is that the component under this head will be assessed at \$40,000.

### **House maintenance**

- [139] This claim consists of two components, one of \$36,765.96 for maintenance on his parents' house and another of \$116,140.37 for maintenance and expenses on his own house. The claim relies upon the reports of Mr Deshon.
- [140] Mr Deshon identified six areas of additional expense in the maintenance of Christopher's present home because of his disability and the fixtures and fittings which are required. He converted those to a weekly cost and they total \$106.26 per week. The present value of that over eight years is the sum claimed. Of that \$106.26, a total of \$78.55 relates to air conditioning running costs and depreciation. As discussed already, the cost of air conditioning Christopher's bedroom should be allowed but not the cost of air conditioning throughout the house. Therefore about \$70 should be deducted from that weekly amount of \$106.26. Another item is \$20.67 per week for depreciation on fittings and equipment. There will be further wear and tear on the house because of the equipment. But some of this claim should be disallowed because it involves items which, to an extent, are appropriate in any case for a house: e.g. (some of) the smoke detectors and security items. Overall I will allow \$30 rather than the \$106.26 per week claimed. As a weekly sum for the next 11 years this amounts to \$13,320.
- [141] The claim for \$116,140.37 is upon the basis of a weekly sum of \$175.77 discounted over 50 years between ages 18 and 68 and deferred for eight years. Air conditioning again accounts for \$78.55 per week. There is a claim for \$64.44 per week for general maintenance costs, for things which it is said would ordinarily be done by a home owner which could not be done by Christopher. The defendant says that many people pay for others to do gardening and like tasks which are claimed here. I accept that it is appropriate to reduce the amount claimed because some of these things might have been done by paid help in any case. About \$30 per week is claimed for mowing the grass. I would allow half of that. I would not allow the cost of painting the exterior of the house. That is something which some people do themselves but it is in a different category from everyday maintenance. I will allow \$40 per week for ordinary maintenance costs. With a further reduction of \$70 per week in relation to air conditioning the claim for \$175.77 per week should be reduced to \$80 per week, which discounted over 33 years and deferred for 11 years is \$40,040.

### House cleaning and housekeeping

[142] According to the plaintiff's particulars, the plaintiff claimed a total of \$755,082 for housekeeping and cleaning costs, of which \$195,776 was for the next eight years whilst he is at his parents' house<sup>17</sup>.

[143] Ultimately the argued claim for housekeeping is \$182,531.63 and for house cleaning, the sum is \$74,664.97. The housekeeping tasks are for things "such as grocery shopping, laundry, cooking and meal preparation." Ms Robertson said that 10.5 hours per week would be required for meal preparation and 2 hours per week for shopping. She estimated the cost of someone employed to do these distinct tasks at \$217.60 per week. There is a claim for that sum from age 18 to 68 in the amount of \$143,779.63. There is also a claim for housekeeping whilst Christopher lives with his parents, which is put at one hour per day and at a weekly cost of \$112, which over eight years is \$38,752. As for cleaning, the claim is for six hours per week (after age 18) which on Ms Robertson's rates would be a weekly cost of \$113.60. That amount over 50 years from age 18 results in the sum claimed of \$74,664.97.

[144] The defendant argues that there should be no allowance because the housekeeping and cleaning will be performed by the team of carers. Mr Hart said that QLS carers undertake all domestic duties both inside and outside the house and as Christopher will have a carer present for a 12 hour shift during the night, there is no need for a cleaner or housekeeper.

[145] Ms Stephenson thought that:

"Ideally the person caring for (Christopher) should be caring for him and not be required to have a lot of cleaning or home maintenance tasks to undertake which can be distracting for care. Sometimes those services are provided by care agencies, but again, if the disability is such that the person requires focused intense care, then it can be very distracting, so usually this is something which needs to be worked out in individual cases. There is no real precedent one way or another but the ideal is that it is separate from the actual care in a case where there is very high support needs."

[146] She continued:

"For that reason intense periods away from him is not an ideal situation such as, you know, if spring cleaning were required or the window cleaning outside where the person is away from him and had heavy noisy cleaning equipment going and were not attending to him, that's not at all an ideal situation, whereas some light dusting, cleaning, wiping benches or wiping up a bathroom after a shower, those sorts of cleaning could certainly be facilitated without comprising his care, I would think. But very intense cleaning or home maintenance tasks should really be, ideally, kept separate."

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<sup>17</sup> There is an apparent error in these particulars and the intended claim was probably about \$543,000 in total.

- [147] Ms Robertson said that her “angels” undertake “light domestic duties in addition to personal care” such as “changing bed linen, bed making for Christopher, putting on the washing and hanging clothes on the line...they would be able to clean up after showering him and perhaps run a vacuum over the bedroom floor and the family room...the heavier cleaning tasks would need to be undertaken by a separate angel”. She said that four to six hours per week would be required for general cleaning, 10.5 hours for meal preparation and two hours for shopping as well as another one hour per week for “paying of accounts and other transactions”.
- [148] Ms McNamee said that Christopher would need two hours per week of cleaning to be undertaken beyond the assistance provided by his carers. It is argued for the plaintiff that that estimate is unrealistic because it was given for a “standard sized house”. That does not make it unrealistic for this case.
- [149] Christopher cannot be left unattended. Shopping would have to be done with him accompanying the carer or at some time when Christopher is being looked after elsewhere (perhaps when he is at school). But shopping in company with Christopher would be difficult to say the least. And some of the more onerous work around the house would need to be done by someone other than Christopher’s carer. The opportunity to do heavy duty work would be limited during the night. Ms McNamee’s assessment of two hours on average per week for cleaning is realistic. Tasks such as meal preparation and laundry could be done by the carer as several witnesses have said. From the time Christopher lives independently, four hours per week for additional cleaning and shopping should be allowed. This is not skilled work and \$18 an hour is a reasonable allowance. That results in \$72 per week which over 33 years from age 21 and deferred for 11 years amounts to \$36,036. As for the period when Christopher lives with his parents, it is said there would be extra housekeeping of one hour per day as a result of his disability. That may be accepted but that need would be met by the carer. I will not allow anything for that period.
- [150] Accordingly the allowance for house cleaning and housekeeping will be in total \$36,036.

### **Future need for therapeutic aids, appliances and equipment**

- [151] The plaintiff claims \$295,348.88 for the cost of acquiring, and in some cases replacing, some 26 items of equipment which are said to be necessary because of his cerebral palsy. In a few cases the defendant says that the item is not required. In a few other cases there are arguments as to quantification. But for the most part, this component of the plaintiff’s claim is not disputed and I will discuss only those items for which there is an issue.
- [152] Christopher needs an electric mobile hoist and he needs a full body sling for that hoist. It is agreed that a sling costs \$213. The defendant would allow for its replacement every eight years. The plaintiff claims its replacement every two years on the basis of oral evidence from Ms Stephenson, which in this respect I accept. I will allow the amount claimed for the sling, which is \$213 for each of two slings replaced every two years.
- [153] There is a claim for the cost of a further hoist, to be fixed within tracking attached to the ceiling in Christopher’s house. I accept that the cost of this would equate to

\$34.61 per week. But I will not allow the claim for this hoist, because I accept Ms McNamee's opinion that it is unnecessary because the portable hoist will suffice.

- [154] The cost of an electric adjustable bed with safety rails is \$2,646. The claim is for \$2.54 per week based upon a life for the bed of 20 years. The defendant says that Christopher would need a bed anyway. That is so but surely not one which costs this much. I will allow \$2, not \$2.54, per week. The defendant says that mattress protectors are everyday items which many people purchase. This particular issue involves \$0.38 per week. I am persuaded to allow it from Ms Stephenson's evidence.
- [155] The plaintiff claims for the cost of a bathchair at \$2,475 and its replacement every three to four years, an equivalent of \$13.59 per week. The defendant says that this item should not be allowed because there will be an allowance for a mobile shower chair/commode. I accept that submission.
- [156] The plaintiff claims for a postural support height adjustable chair at a cost of \$5,313 and to be replaced at 10 yearly intervals, an equivalent of \$10.21 per week. There is also a claim for customised lounge chair supports at a cost of \$200 to be replaced every five years, an equivalent of \$0.76 per week. But Ms Stephenson said that Christopher should be able to use his wheelchairs in order to, for example, sit at a table to eat. But Ms Stephenson (in her report of July 2004) also said that this chair would "promote an ergonomically satisfactory position as he continues to grow" and that "he has need for specialised postural seating support for his lifetime." In the same report she says that he will require "additional customised support in a lounge chair as an adult." I reject the defendant's argument that this last item is simply an ordinary household item of furniture. There should be some reduction of the claim for those chair supports because they will not be needed until he is an adult. I will subtract \$200 on that account but otherwise allow for the adjustable chair and the lounge chair supports as claimed.
- [157] There is claim for a hoist for use in a swimming pool. I accept that the cost is \$2,155 and that it would require replacement every 10 to 15 years. But I will not allow the claim, for reasons I have given in relation to the claim for the construction and maintenance of a hydrotherapy pool. I did make some allowance there for the contingency that the public facility will not always be able to be used by Christopher. Consistently with that I would allow a total of \$500 for this item.
- [158] There is a claim for the cost of an insulin pump of \$8,000 to be replaced every four years (\$38.46 per week), the running costs for that pump of \$3,000 per year (or \$57.69 per week) and the cost of consumables for that pump, also quantified at \$57.69 per week. I accept those costs are involved if the pump is used, as it is likely to be used by Christopher for the rest of his life. The alternative is to have his carer inject him four times a day which would require Christopher to be removed from his chair. The need to inject Christopher would place an additional burden upon his carers. There are many other advantages of the insulin pump which were detailed by Dr Jack.
- [159] The defendant does not argue it would wrong or unnecessary for Christopher to use an insulin pump. Its argument is that this is such an advantageous alternative that it would be an appropriate form of management for Christopher's diabetes, if he did not have cerebral palsy. Dr Jack wrote that "insulin pumps offer a more

physiological insulin delivery and therefore advantages in metabolic control, reduction in hypoglycaemia and improvement in lifestyle flexibility and patient acceptability." She said that because of Christopher's slow and unpredictable eating resulting from his severe cerebral palsy, an insulin pump allows the most precise insulin delivery to match his carbohydrate intake and that "continued use of the pump is essential to maintain the benefits currently being experienced" and that "the more user-friendly pumps become the more likely that Christopher's carers will be able to optimise his diabetes management." She also said that the pump is the "best option for children under five" and "should be considered as a treatment option for all patients". In her earlier evidence Dr Jack conceded that when writing her report she did not think Christopher could detect well his hypoglycaemic events although Mrs Hills said that he could tell that he was at level three which Dr Jack said was not a dangerous level. He could communicate the fact of his awareness of that with the technological aids he will have. But the pump provides an assurance against the prospect of something going awry in that communication and the carer's immediate and necessary reaction to it.

- [160] But Dr Jack does not say that for all patients with type 1 diabetes, the insulin pump is reasonably required. On her evidence it has many advantages but it is not essential in every case. A patient without Christopher's disabilities would have a choice between those advantages and the alternative management of the diabetes at a much lower cost and without having to wear an attached pump, by regular injections. But as I see the effect of her evidence, Dr Jack believes that in Christopher's case the insulin pump is reasonably required. He cannot inject himself and several daily injections a day by carers would impose a burden which, in the long run, is likely to increase the cost of his care. He has erratic eating and activity patterns and he will have some disadvantage in communicating his own hypoglycaemia. The use of the pump makes his diabetes management more assured in the event of some error or neglect by a carer. I find that the insulin pump is reasonably required, because of his cerebral palsy.
- [161] There is a *need* then in Christopher's case for the fact of his cerebral palsy. And as I have said, the pump is likely to somewhat reduce the cost of his care in the long term. In my view he has proved the need for this pump and these parts of his claim should be allowed. Possibly, without cerebral palsy he would have used an insulin pump, at least for certain periods. But as a result of the defendant's negligence, he has a need for the pump and the assessment should not be reduced on account of the chance that he would have chosen to use it anyway: *Van Gervan v Fenton* (1991) 175 CLR 327 at 338.
- [162] There is a claim for the future cost of orthotics. The claim relies upon the evidence of Mr Egan a podiatrist. He mentions in one of his reports that Christopher has found ankle foot orthoses (AFOs) very uncomfortable and his parents have found them difficult to apply. Christopher does not use orthotics and has not done so for a number of years although they are available free of charge at the local hospital.
- [163] But Mr Egan ultimately proposed AFOs, which he estimated at \$80 to \$130 a pair for "simple back slab AFOs" which would need replacing as Christopher grows, and added that "for walking an articulating or spring loaded AFO would be ideal as this device actively places the foot in the best position", which would cost from "\$400 to \$4,000" a pair and require "regular reviews initially ie two-three months and then yearly or as Christopher grows". He would also need customised shoes at \$100 -

\$800 a pair. In his oral evidence he seemed to indicate that his views were based upon some prospect that Christopher would become able to put his weight on his feet. But there is no such prospect and the impression I have is that Mr Egan's recommendations are unlikely to be taken up in practice. As I have said Christopher has found the orthotics very uncomfortable and has rejected them. I accept that Christopher will require more expensive footwear. Against that he is not going to require replacement of that footwear as often as he would if he was walking. Yet ultimately the argument for the plaintiff, based upon Mr Egan's evidence, is that I should allow the equivalent of about \$56 per week for orthoses over the rest of Christopher's life.

[164] In the plaintiff's particulars, there was a claim for orthotics at a \$1,000 per year over the next nine years and after that at \$1,000 every two years, based upon the report of Dr Kennedy. Dr Kennedy there estimated the relevant cost in the range of \$100 to \$500 every six months whilst Christopher is growing and on average two years thereafter. The claim and the particulars are based on the top of that range. Adopting the mid-point of his range, the cost would be more like \$12 per week as a child and \$3 per week thereafter. I would accept Dr Kennedy's evidence on this point. In his clinical judgment there is a strong case for the use of orthotics not only for the ankles but also for the upper limbs. I will adopt his figures and not those of Mr Egan. Mr Egan's evidence varied in his estimates from report to report. And allowance should be made for the prospect that Christopher will simply not choose to wear the orthotics. Overall I would allow \$12 per week for the next seven years whilst Christopher is growing and thereafter \$3 a week. This amounts to a total for all orthotics of \$5,575.

[165] In the annexure to the plaintiff's written submission, the total weekly cost of these 26 items is \$291.27, to which the plaintiff's case would add \$34.61 for the ceiling hoist and its tracking. I have disallowed that last item and certain components of the \$291.27 (\$57.68 for orthotics, \$0.54 from the bed and \$13.59 for the bathchair) leaving a balance of \$219.46. That over 44 years is \$207,170. As I have mentioned there is a \$200 reduction<sup>18</sup> and there must be added \$5,575 for orthotics and \$2,231 for the once only cost of replacing Christopher's Mulholland walker and \$500 for the pool hoist. The result is the total for this component will be \$215, 276.

### **Maintenance on therapeutic aids, appliances and equipment**

[166] The particulars claim \$20,000 based upon Ms Stephenson's estimate in her report of 16 August 2005. She there details costs of servicing the wheelchairs, an electric mobile hoist and the adjustable bed, which together would amount to \$525 per year. She adds \$104.50 per year for the pool hoist and \$328 a year for the servicing of a vehicle for Christopher. I am not allowing the cost of the pool hoist. The claim for servicing the van is not shown to be a specific consequence of Christopher's needs through his disabilities. I will allow \$10 per week over 44 years which amounts to \$9,440.

### **Technology issues**

[167] The various claims under this heading rely principally upon the evidence of Ms Hutchinson, an occupational therapist with a particular interest in the use of

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<sup>18</sup> At [156]

technology to assist people with disabilities and communication impairments. The defendant relies upon the evidence of its witness Ms Smith, an occupational therapist. Based largely upon Ms Hutchinson's most recent report, the claim under this heading is \$463,087.51.

- [168] As the defendant concedes, Christopher will need at least one computer at any time throughout his life. Ms Hutchinson and Ms Smith agree that it is reasonable for Christopher to have a laptop computer when he is at secondary school, as well as use of a desktop computer at home. Ultimately there is no claim for the cost of that home computer, either for when Christopher is living with his parents or independently, and the claim thereby accepts the defendant's point that a desktop computer is an everyday household item. So far as the cost of acquiring a computer, the only issue is whether there should be an allowance for a laptop computer before Christopher begins secondary school. Ms Smith says that Christopher's reasonable requirements until he reaches secondary school could be met by the device which he will have for communication, called the Pathfinder.
- [169] The Pathfinder is a device which is about the size of a laptop computer and which Christopher will have mounted on his wheelchair and accessible at all times as a device by which he will be able to converse. It enables someone to generate the sound of spoken words by using a keyboard, switch, touch screen or head pointing system. Christopher has had some experience already with the Pathfinder, using a head switch to select the images on the Pathfinder's screen which correspond with the word and phrases to be expressed. The successful use of the Pathfinder will require considerable training but it is common ground that the device is appropriate and essential in Christopher's case, and that Christopher is likely to be able to engage in effective conversation with this or a similar device over the rest of his life. Ms Smith says that the device will also provide the service which Ms Hutchinson says should be provided by a laptop computer over the next three years, i.e. until secondary school. The Pathfinder has optional features, called a "Productivity Bundle", which provides a word pad, spreadsheet, calendar, PDF viewer and media player. Ms Smith says this should enable Christopher to take notes in the classroom without the need for a laptop computer. Text could be saved directly onto a memory stick and transferred onto the home computer or school computer, which Ms Smith thinks would be a more "functional setup for direct access to text entry". The Pathfinder can also connect to a computer so that with additional software, the Pathfinder can act as the keyboard and mouse to operate that computer.
- [170] Ms Hutchinson says that even at primary school, Christopher should have both his Pathfinder and a laptop computer, together with an onscreen keyboard called WiViK. This is operated by the user selecting keys by a mouse device, which Ms Hutchinson says should be that known as the "TrackerPro". This device, a substitute for a mouse, is operated by movements of the user's head. The user wears a small dot on the forehead, nose or head wear, which is then tracked by a camera device sitting on top of the computer screen, so that the movement of the head results in a certain movement of the dot which is translated into mouse cursor movement. Again this operation of a laptop will require considerable training.
- [171] Ms Smith believes that Christopher should spend the next few years concentrating on the mastery of the Pathfinder. Further, it would be cumbersome for Christopher to go to school with both the Pathfinder and the laptop, which cannot be used at the

same time. I accept her opinion that it is more appropriate for Christopher to use the Pathfinder and not also the laptop computer whilst he is at primary school. Ms Smith says that once Christopher is at secondary school then he could require a laptop computer to take to school, at least if he is going to school full time, because by then recording school work in text only format on his Pathfinder would be inadequate. She says that an anticipation of two laptop computers over the six years at secondary school would be reasonable. There is no claim for the cost of a laptop computer for the period after Christopher leaves school. I also accept Ms Smith's evidence that the use of the Pathfinder should make it unnecessary to employ the assistance of the additional access provided by the WiViK onscreen keyboard and the ProTracker device which Ms Hutchinson recommends. Ms Hutchinson's assessment allows for an external hard disk drive for back up purposes. I am not persuaded that more than a flash drive (or memory stick) as proposed by Ms Smith is required.

- [172] There is no significant difference between the respective estimates of the cost of the items which should be allowed and I will use Ms Hutchinson's figures. I will allow \$2,811 for the cost of a computer, a high capacity battery and an extended warranty together with \$189 for a memory stick, which is a total of \$3,000. I will allow for that expense in three years time and the same amount again in six years time. That totals \$4,830.
- [173] The defendant makes two particular challenges to the claim for software. The first is to the plaintiff's claim that there should be an allowance for the annual upgrading of the computer's operating system. Ms Smith says that this is not necessary because there is an upgrading effectively on the replacement of the computer every three years, which is sufficient. I accept that evidence and the defendant's submission upon it. The second is that the cost of software should be discounted by 50 per cent for the likelihood that it would have been necessary in any event. Again that submission is persuasive. I will otherwise accept the calculations within Ms Hutchinson's final report. Before that discount, that involves costs for those items which Ms Hutchinson puts under "software – general" of the equivalent of \$4.60 per week for the next nine years and \$8.21 from age 19. After discounting and then a reduction of 50 per cent, there is a total to be allowed for those items of \$3,191. Otherwise in relation to software, I accept Ms Smith's opinion as to what is reasonably required. She allows \$1,503 as a one off cost for educational software and \$500 for every three years for leisure software. Ms Smith says that Christopher will be far more dependent upon computer resources as a result of his disability and his teachers and therapists are likely to recommend specific software for him. And she also says that, Christopher's leisure options are less for his disability and hence there should be an allowance for extra software on that account. Otherwise I am not persuaded that what is claimed by the plaintiff should be allowed. For those items of educational and leisure software I would allow \$1,503 plus \$500 every three years (\$3.21 per week) which to age 54 is a further \$3,031, making a total of \$4,534. There is a claim for software for the WiViK keyboard and magic cursor which are not required under what Ms Smith proposes for the years of the Pathfinder. The total for software is therefore \$7725.
- [174] Ms Hutchinson recommends a height adjustable computer table, an ergonomic chair and what is described as an Ergo Q, which is a device to enable a laptop screen to be mounted at an appropriate height for Christopher. That last item involves a cost of \$0.86 per week. But Christopher is likely to be seated in his wheelchair, and some

furniture would have been needed in any event. I will not allow the items claimed under “furniture” in the schedule to Ms Hutchinson’s report.

- [175] A printer is costed by Ms Smith at \$179 every three years. I will not allow that cost because like the home computer, it is an item likely to have been required absent Christopher’s disability.
- [176] Ms Hutchinson recommends an electronic organiser. He would not be able to enter information into this device except via his computer but he could ask his carers to do so. Ms Smiths says that the “Productivity Bundle” of the Pathfinder includes a program for an electronic calendar which would suffice. I will not allow the claims in these respects.
- [177] I come then to the issues in relation to training in computers and other technology. For the period up to aged 12, Ms Hutchinson recommends training for Christopher of five two hour sessions and training for his carers in his use of computers of a total of 48 hours, at an all up cost of \$8,019. Ms Smith’s recommendations for those same years would cost \$6,022. For between the ages of 13 and 18 the plaintiff’s claim, based on Ms Hutchinson’s assessment, is for a total of \$5,412 (deferred to age 13), whereas Ms Smith has assessed \$6,960. For the period from age 19 onwards, the plaintiff ultimately claims a once only expense of \$4,961, compared with Ms Smith’s assessment of a total \$3,394 per year. In addition Ms Smith recommends a periodic re-assessment of Christopher’s performance with the computer which involves four hours every three years during his childhood (ages 12, 15 and 18) at a total cost of \$1,560. I will accept Ms Smith’s evidence. I note that this is more favourable to the plaintiff than Ms Hutchinson’s ultimate report, upon which the plaintiff’s claim was argued. In particular it is reasonable to allow, as Ms Smith would, for the substantial ongoing cost of providing technical support and training for Christopher and his carers on a year by year basis. On the basis of Ms Smith’s estimates, the defendant submits that the total cost of training should be allowed at \$43,220. But this requires adjustment because it assumes the life expectancy of 48.5 years not 54 years. The adjusted figure is \$50,484.
- [178] It is common ground that the plaintiff should be allowed the cost of a Pathfinder every five years. It is agreed that the cost of the Pathfinder is \$14,899. The estimates for the cost of mounting the Pathfinder vary from \$1405 every seven years (Smith) to \$2,000 every five years (Hutchinson). Ms Hutchinson also estimates \$3,696 for “setup and customisation”. Ms Smith says that setup will be part of the training process and can be included in the 90 hours of training recommended by the suppliers. I accept that evidence. Accepting her estimates of the cost as I do, the initial cost is \$17,537 and thereafter the recurrent cost is equivalent to \$68.84 per week which over 44 years is \$64,990 making for a total of \$82,648.
- [179] There is also a claim for \$1,232 per year as the cost of ongoing “technical support” for the Pathfinder. But Ms Smith’s assessment allows for the cost of an extended warranty so I will not allow that item. There is a claim for ‘re-assessment’ which is the re-assessment of Christopher’s use of the device. The cost of that is adequately covered by the award for services of an occupational therapist which are discussed below.

- [180] As to the cost of training Christopher in the use of the Pathfinder, the plaintiff's particulars had claimed \$13,640, on the basis of the estimate of Ms Briker-Bell, speech pathologist, of 124 hours at \$110 per hour. The manufacturer recommends 90 hours of training which both Ms Smith and Ms Hutchinson would accept. Ms Hutchinson allows \$132 per hour for that; Ms Smith allows \$130. I will allow \$11,800 for the initial training in the use of the Pathfinder. The defendant's argument is there should be no allowance for training thereafter. The evidence of Ms Briker-Bell was the basis for further claims for training Christopher and staff on the Pathfinder in amounts totalling just over \$76,000. This includes 16 hours per year at \$110 per hour "for reviews and goal setting", the necessity for which is not demonstrated. Ms Hutchinson agreed that once Christopher is proficient in the Pathfinder he will require only "minimal" training including on any upgrade of the device. Nevertheless Ms Hutchinson has estimated a cost \$1,232 for every year from Christopher turning 13 in his training for communication devices. This involves two x two hour sessions (at \$132 per hour) plus travel time of four hours per session (at \$188 per hour). I am not persuaded that Christopher will need that much training, year in year out. Ms Smith says that the small amount of any required training can be obtained from the supplier's workshops or in the course of ongoing speech therapy. I will allow \$2,000 for further training on the Pathfinder to cover the prospect of further training being required by some developments in the device.
- [181] Accordingly the allowance for technological assistance and training will be  $(\$4830 + \$7725 + \$50,484 + \$2000 + \$82,648 + \$11,800) = \$159,487$ .
- [182] I come then to the claims in relation to what are called "environmental controls". By this, Ms Hutchinson and Ms Smith mean the control which Christopher can be given by technology in the operation of things such as televisions and other entertainment appliances and lights and the opening of doors and curtains. The defendant accepts that Christopher is entitled to a reasonable allowance for a device or devices which will permit him to do these things rather than having to rely upon his carers. Ms Smith says that "the ability to control one's environment is a fundamental right that should be available to Christopher within the limitations of his disability for independence, safety and self-esteem". She says that the Pathfinder has inbuilt infrared environmental controls to operate appliances which are usually operated by remote control such as television, VCRs, DVDs and music systems. The Pathfinder can copy the remote control signal from any other remote control. But it will not control doors, lights and curtains. Ms Hutchinson suggests a system from the age of 13 years, and assesses the annual cost from age 13 to 18 at \$4,982. The cost after that point is assessed at an equivalent of \$4,861 per year. Ms Smith says that in addition to what the Pathfinder could provide, it would be appropriate to have three automatic doors, including two exits from the house, which could be operated by Christopher, as well as a system involving an intercom and camera from when Christopher is 19 years of age. She has also allowed for his control of lights and heating/air conditioning. I agree with her statement that independent control of curtains or blinds is not reasonably necessary given the presence of 24 hour care.
- [183] Ms Smith allows for a one-off cost of \$520 to assist Christopher's needs and then for a number of devices to perform the functions I have described, together with an allowance for training, all of which (apart from that \$520) equates to annual cost of \$4,657. That includes \$1,800 per year for automatic door openers with sensors

(three doors replaced every five years at a cost of \$3,000 each), \$579 per year for a security system with video intercom (\$2,895 with a life of five years) and \$800 per year for modules for lights and appliances (\$4,000 replaced every five years). The defendant argues that those three items should not be allowed because they have been included in Mr Deshon's costings for Christopher's own house. It is not clear that that is so. But in any case I have assessed the extra cost of a house, for when Christopher lives independently, by reference to Mr Leck's evidence. He allowed \$1,500 for a front door intercom and door lock but otherwise I do not see that Mr Leck's calculations allowed for these items. And they are recurrent costs.

[184] As I have said, the evidence of Ms Hutchinson is that there are annual costs of the order of \$4,800 to \$4,900 per year. To this must be added her evidence as to what she calls technical support. Before going to that however, it may be noted that her allowance for the cost of curtain controllers is about \$260 a year. The result is apart from what Ms Hutchinson says about technical support, her figures correspond with those of Ms Smith which I will adopt.

[185] As to that claim for so-called technical support, Ms Hutchinson has already allowed within her costing an expense incurred every five years in the sum of \$2,068 for what she describes as "technical installation and setup". Yet she appears to suggest a further \$2,068 per year for "technical support" of the various devices involved in environmental control. It does seem extraordinary that such relatively simple devices would cost of the order of \$46 per week to keep them working. The basis for this amount, apart from the fact that it is simply asserted by Ms Hutchinson, does not appear. I reject it.

[186] The result is that I will assess the cost of this environmental control according to Ms Smith's evidence. I will allow \$4,600 per year, or \$88.46 per week from the time Christopher is 21 and is assumed to be living independently. Because some of these devices are reasonable for Christopher before he lives independently, I will allow that sum from the age of 14, (as broadly equivalent to his needs between now and 21). I will therefore allow it for 40 years deferred for four years, which amounts to \$66,808. To this should be added Ms Smith's \$520 for the initial assessment of Christopher's needs, resulting in an allowance for environmental control in the sum of \$67,328.

[187] What I have said so far determines the claims within the first 147 items in the schedule within the plaintiff's written argument under this heading. There remain items 148 to 162 which are based upon evidence given by Ms Briker-Bell. There are certain items involving a once only expense and which total \$3,044. There are other items involving recurrent expenditure which the plaintiff's written submission converts to weekly costs and the total of them is a weekly cost of \$98.44 which is then claimed over the rest of Christopher's life.

[188] Of those items, the most expensive is the so-called eye gaze communications system which Ms Briker-Bell costs at \$8,000 to \$20,000 with a life of five years. The claim is for \$14,300 every five years or \$55 per week. This system involves the use of a camera on a computer which watches the pupil of the eye of the user and tracks its movements. It enables the user to operate the computer effectively by eye movement. But it requires the user to keep his head relatively still. Ms Bricker-Bell admits that she has no experience with this system and I had

impression from one answer she gave<sup>19</sup> that as far as she was aware the system had not been used in Australia. Clearly Christopher has difficulty in keeping his head still. I am not persuaded by her evidence that this system is appropriate for Christopher, let alone necessary. She agreed that the Pathfinder is an “excellent device and it’s obviously what Christopher needs”.

[189] There is a claim for \$8.46 per year for the cost of training Christopher in the use of a replacement Pathfinder, according to Ms Briker-Bell’s most recent report. I have already discussed the claim for that training and I will not allow this particular item. Ms Briker-Bell also suggests educational and therapeutic computer programmes at a cost of up to \$400 per year, and upon the basis of that there is a claim for \$7.69 per week. But I have made some allowance in that respect already. I have also allowed already for the cost of a possible hire of a replacement Pathfinder<sup>20</sup> during repairs so that puts paid to item 161. Otherwise there is no apparent challenge to the items claimed under “additional recommendations”. In particular Ms Briker-Bell was not challenged on her recommendation for a device which Christopher can operate to turn pages of a book. With the exception of the items I have mentioned, I will allow those items from number 148 onwards in the plaintiff’s schedule. They amount to \$3,044 as one off costs and recurring costs of \$23.72 per week which over 44 years is \$22,391. I will allow then a total of \$25,435 for these so-called additional recommendations.

[190] Accordingly, the total allowed under this heading will be:

As per [181]	\$159,487
As per [186]	\$67,328
As per [189]	\$25,435
Total:	<u>\$252,250</u>

### **Future medical treatment**

[191] The claim here is for \$42,533 which is \$42.28 per week discounted over 58 years.

[192] The first part of this claim is for three visits to a general practitioner at \$150 each per year. The defendant says that no allowance should be made as the defendant would have to see a doctor often in any event because of his diabetes. In my view his cerebral palsy makes it likely that he will visit a GP yet more often. There will be a cautious approach by his carers which makes it likely that they will have Christopher see a doctor in circumstances where a person without Christopher’s disability would not do so. I would allow \$5 per week for the next 44 years which equates to \$4,720.

[193] The next component is for an annual check by a rehabilitation physician. Dr Kennedy says that those reviews would cost \$100 to \$300 each time. The plaintiff claims \$5,706 on the basis of one visit per year at \$300 over 53 years. The defendant says that \$150 per year could be allowed. I will allow that \$150, or \$2.88 per week for 44 years which equates to \$2,718. I accept that Christopher will need

<sup>19</sup> Transcript page 416

<sup>20</sup> Part of Ms Smith’s costing of recurrent items totalling \$68.84 per week.

to see a physician regularly because of his diabetes but what I have just allowed is a reasonable estimate of the requirements of his overall needs because of his cerebral palsy.

- [194] Dr Kennedy says that the plaintiff should have a review by a neurologist at least every other year but perhaps more frequently, for which the cost would be between \$100 and \$300 a time. The claim is for a visit every two years at \$300 over 53 years. Dr Kennedy did not really explain why that review would be required and I will not allow for it.
- [195] The particulars contain a claim for \$114,115, being the present value of \$6,000 per year over 53 years, for injections of botulism toxin designed to reduce spasticity. But according to Dr Harbord's evidence, Christopher would have no need for these injections. Ultimately the plaintiff's written submissions did not pursue this claim.
- [196] There is a claim for dental treatment of about \$25 per week over Christopher's life. That includes dental cleaning every two months at a cost of \$800 per year and four visits per year to a dental hygienist at \$150 per visit. The issue is whether Christopher's cerebral palsy is likely to result in his tooth cleaning at home being less than it otherwise should be, because it is more difficult for someone to clean his teeth. At least to date, Mr and Mrs Hills have cleaned his teeth effectively. Not every carer might do so well. But because of his diabetes he would be going to the dentist more than the average person. Dr Dunn, a dentist called for the plaintiff, agreed that if Christopher's teeth are properly cleaned by someone he is in no greater risk of dental problems because of his cerebral palsy than any other diabetic person. Diabetes is a high risk factor in periodontal disease, as many witnesses agreed. Christopher has been seeing a dentist every six months and his dental health is good. I am not persuaded that he has a need for any greater dental care because of his cerebral palsy and nothing will be allowed for dental care.
- [197] The result is that the allowance for future medical treatment will be as follows:

General Practitioners	=	\$4,720.00
Rehabilitation Physician	=	\$2,718.00
Total		<u>\$7,438.00</u>

## **Future paramedical treatment**

### **Speech pathology**

- [198] The ultimate argument for the plaintiff is according to an annexure to the plaintiff's written submissions, which contains six items relevant to speech pathology.
- [199] The first of those is for a speech pathologist to train Christopher in the use of the Pathfinder. I have assessed this already, at 90 hours according to the evidence of both Ms Hutchinson and Ms Smith. But as I then mentioned, Ms Briker-Bell recommended 124 hours so at this point the plaintiff's argument claims for those extra 34 hours at \$140 per hour. For reasons already given that component will not be allowed.

- [200] The next item is for 16 hours per year for eight years (the remainder of Christopher's schooling). During those eight years, Ms Briker-Bell also recommends an average of 60 hours per year of ongoing speech pathology for Christopher's language development. She explained that "the idea...is to be customising language, particularly to his curriculum needs, and working on his language, so this is also incorporating specific speech-language therapy". She saw the need for this because Christopher "is not in a standard classroom learning English as a child who can communicate can learn English. He – what I saw at the end of 2003 was that he still needed help to build sentences, to get verb tense, those basic structural things associated with expression." The defendant's argument is that these components should not be allowed at all. The defendant argues that language development can be achieved through schooling without the assistance of a speech pathologist. But I am persuaded that there is a need for ongoing speech pathology especially during the next few years at school. Ms Briker-Bell has explained why Christopher needs particular assistance although I am not persuaded that he will need that assistance throughout his school life and to the extent that she suggests. Nor am I persuaded by her evidence that he should have four hours at the end of each school term, or 16 hours per school year, of the services of a speech pathologist for "a thorough review involving goal setting and subsequent report writing" (Item 3 of the claim). For those two items, I will allow one hour of speech pathology per fortnight for the next eight years. I will allow that at the rate of \$125 per hour which is the average hourly rate within the range provided by Ms Briker-Bell. It follows that for speech pathology over those next eight years I will allow \$62.50 per week resulting in \$21,625.
- [201] Item four within the plaintiff's schedule claims ongoing speech pathology from age 18, at 12 hours per year, again based on Ms Briker-Bell's evidence. I will allow that from age 18 which at \$125 per hour equates to \$28.84 per week. Calculated for 36 years and deferred for eight years, the present value is \$17,277.
- [202] Item five claims two hours per year for the rest of Christopher's life for a speech pathologist to train and monitor carers in the safety of Christopher's swallowing. This item is all but conceded by the defendant, as it should be. The amount allowed will be two hours at \$125 per hour, or \$4.80 per week, over 44 years which amounts to \$4,538.
- [203] Lastly there is a claim for additional speech pathology to monitor the safety and efficiency of Christopher's swallowing mechanism from the time he is 45. Again this is effectively conceded at two hours per year. From age 45 for nine years at \$4.80 per week deferred for 35 years, the amount is \$330 which will be allowed.
- [204] The total allowed for speech therapy is therefore \$43,770.

### **Occupational Therapy**

- [205] The plaintiff claims for an occupational therapist at \$125 per hour for four hours every three months, equivalent to \$36.92 per week for the rest of Christopher's life. That is supported by the evidence of Ms Stephenson. The occupational therapist called by the defendant, Ms McNamee, said that it may be necessary to have five to 10 sessions per year until age 15 to address self care and equipment issues and from then on for Christopher to visit an occupational therapist two to three times every five years for particular needs. Dr Kennedy said that there should be an

occupational therapy assessment every two years but perhaps more frequently. I am not persuaded that I should reject Ms McNamee's opinion and accept that of Ms Stephenson on the question. I will allow 10 sessions per year until age 15 and three sessions every five years thereafter. These sessions might be one or two hours each. I will allow \$120 an hour and \$180 per session. To age 15 this involves \$34.61 per week which for the next five years amounts to \$8,029. From age 15, the weekly equivalent is \$2.87 per week which over 39 years and deferred for five years amounts to \$2046. I will allow \$10,075 for occupational therapy.

### **Nutritional Therapy**

- [206] Ms Stephenson says that Christopher will need nutritional therapy, the cost of which she estimates to be \$60 for a one hour session every six months. However as she says in her May 2005 report, he has been receiving nutritional therapy due to his diabetes. It is not demonstrated that the need for this therapy is due to Christopher's cerebral palsy and the claim will not be allowed.

### **Podiatrist**

- [207] Again based on Ms Stephenson's evidence, the claim is for one hour every six weeks at \$100 per hour. Dr Jack said that children with diabetes generally need good foot care and require regular podiatry attention. But she added that because of Christopher's cerebral palsy, he was also "more likely to induce injury to his feet and therefore (to need) more attention to foot care than a child with diabetes would normally require." Mr Egan, a podiatrist, did not think that Christopher had additional needs because of his cerebral palsy. I prefer Dr Jack's view about that. Some allowance should be made for the likelihood of an extra cost of podiatry. I will allow 10 per cent of the amount claimed which results in \$1.66 per week which over 44 years is \$1,567.

### **Psychologist**

- [208] Again based on Ms Stephenson's evidence, the claim is for 10 hours of psychological counselling for each year between the ages of 15 and 18 (\$130 per hour). Mrs Hills says that Christopher is happy and emotionally mature. But Ms Stephenson says that counselling is recommended for psychological issues that may arise in his emotional and sexual development. I accept that there is a prospect that he will require some counselling from outside his family about those issues. I will allow \$1,500 which is close to one half of what is claimed.

### **Physiotherapy**

- [209] There is a claim for initial physiotherapy of eight sessions at \$300 per visit (\$2,400) and ongoing physiotherapy involving five sessions per year at \$200 per session (\$19.29 per week) over Christopher's life. These claims are based on evidence given by Dr Kennedy and Ms Stephenson. Dr Kennedy said that Christopher should have a full physiotherapy/hydrotherapy review, of six to 10 initial sessions costing \$150 to \$500. That supports the claim for the \$2,400. Dr Kennedy says that there should be a regular review by a physiotherapist of four to six sessions of hands on therapies per year costed at \$100 to \$300 per year. That supports the claim of five sessions at \$200 each or \$19.29 per week. That weekly sum over 44

years is \$18,209 which added to the \$2,400 amounts to \$20,609 which I will allow for physiotherapy.

### **Home nursing**

- [210] This is a claim for a home visit by a nurse to change the insulin pump set every 10 days. At a cost of \$79.50 per visit, that equates to \$55.80 per week, which is claimed over the rest of Christopher's life. The defendant argues that this is a cost from Christopher's diabetes, not from his cerebral palsy. But earlier discussed in relation to the cost of the insulin pump, Christopher has a *need* for that device because of his cerebral palsy.
- [211] More generally however, there should be an allowance for regular visits from a registered nurse to monitor Christopher's health as well as specifically to attend to the insulin pump. Mr Hart said that there may be a need for such regular visits from a nurse.
- [212] There is a distinct claim for a so-called case manager, who is someone to co-ordinate the carers and health care professionals and to otherwise assist Christopher in the management of his affairs. As I later discuss, a registered nurse would be well qualified to perform that role and at the same time provide the benefits of regular nursing visits. If the nurse is not to act as a case manager, I would not accept that nursing visits as regular as one per month are required. Ms McNamee said that Christopher ought to have sufficient medical monitoring through frequent visits to his general practitioner and other specialists. If I were separately assessing this component I would allow no more than four visits per year (or \$6 per week). I will not allow this component because I will assess the case manager claim upon the premise that the role can be well performed by a visiting nurse.

### **Diversional therapy**

- [213] Ms Stephenson says Christopher would benefit from the services of a diversional therapist who would:
- Assist him to identify and choose recreational interests
  - Encourage and support him to engage in leisure activities in keeping with his needs
  - Inform his parents about the available resources within the local community
  - Facilitate interaction between Christopher and the community
  - Organise leisure activities and events of interest to Christopher and beneficial to his development, such as forming contacts with community groups and promoting Christopher's social engagement.
- [214] The cost of such a person is estimated by Ms Stephenson to be three hours for each and every day from when Christopher leaves school, at \$26 per hour which equates to \$546 per week.
- [215] The intended purposes to be served by engaging such a person are clearly worthwhile. At least for when Christopher is no longer with his parents, he is likely to benefit from some assistance in these respects. Ms Stephenson says that the

skills of a diversional therapist are more specific than the skills of a personal care worker and that in Queensland, diversional therapists are required to obtain a diploma or degree in diversional therapy or leisure and health studies. But Ms McNamee said that it was not necessary for Christopher to receive this assistance and that Christopher will gain social contact through school and other activities.

[216] The question is whether the services of a diversional therapist are reasonably required in Christopher's case, where he has and is likely to enjoy a high level of support and encouragement from his family and he will have a full time carer at all times. He is alert and of at least average intelligence and he will be able to identify his own particular leisure interests. I am not persuaded that a diversional therapist is reasonably necessary in his case. I find Ms Stephenson's evidence that he will need the services of such a person for three hours of every day of his adult life particularly unpersuasive. This claim will not be allowed.

[217] Accordingly, the total allowed for future paramedical treatment will be:

Speech Pathology	\$43,770
Occupational Therapy	\$10,075
Podiatry	\$1,567
Psychology	\$1,500
Physiotherapy	\$20,609
Total:	<u>\$77,521</u>

### **Pharmaceuticals**

[218] The plaintiff claims \$42,182 for future pharmaceutical expenses. The first component of that is \$33.07 per week for incontinence supplies. But in my view there is a substantial prospect that Christopher will become continent and I would reduce this claim by 20 per cent. I would allow \$26.40 per week for 44 years which results in \$24,921.

[219] In his April 2005 report, Dr Kennedy said that the plaintiff would be well served with the use of anti-spasticity medication costing in the vicinity of \$100 per month. He said that it was not uncommon that as a child develops that he requires this sort of medication to address the development of contractions. The plaintiff argues that it would be a reasonable approach to take that yearly sum of \$1,200 per annum, discount it by 25 per cent for the possibility that it may not be required and then defer the onset to say age 30, which yields \$3,604. But the likely need for this medication is not in my view established. I am not persuaded by Dr Kennedy's opinion that Christopher has or is likely to develop some spasticity. The remainder of this claim is based upon Dr Kennedy's evidence as to the possible need for botulism toxin injections which I have already rejected.

[220] The result is that under this heading I would make that allowance for incontinence supplies in the sum of \$24,921 but allow nothing else.

### **Additional education costs**

[221] This claim is based upon evidence given by Ms Pisk whose stated qualification is consultant vocational and careers adviser. In her opinion, Christopher will be able to complete school and tertiary studies only with a full time qualified special needs teacher to assist him “to comprehend more difficult concepts that arise in higher secondary and tertiary levels”. She says that his disability will make it unfeasible to take notes and to follow the directions of the teacher at the same time. He could be late to class and his diabetes could mean loss of days at school. The special needs teacher would assist him with coaching, organisational skills and explaining abstract concepts. She says that the time that Christopher must spend on extra physical needs, such as occupational therapy and physiotherapy, could cause him to have insufficient time for his academic pursuits. She recommends that he have at least 30 hours of assistance from a teacher’s aide per week throughout his school and post school academic career. This assistance is in addition to that which would be provided by a personal carer. So under her proposal Christopher would attend school and university each day with both a carer and an aide.

[222] At present Christopher attends a nearby state primary school for one full day each week. His grandmother is paid by the Department of Education to act as his teacher’s aide on that day. The defendant called evidence from Mr Turnbull, who is the Principal Education Officer, Student Services at the Toowoomba District office of the Department. He said that assuming an assessment of Christopher showed that he could cope with school every day, the Department would “look at trying to provide 25 hours per week” of the services of a teacher’s aide. He said that if Christopher’s parents wanted him to attend school full time, he would meet with him and the teachers, discuss matters such as what Christopher could cope with, what are his needs and if it was decided that he could cope with school all day “I would look at trying to provide the 25 hours a week”. At present it is his decision as to how the resources made available to him are distributed across the various schools for which he is responsible. When he was asked by the defendant’s counsel whether an allocation of a teacher’s aide would be available to Christopher through to Year 12, Mr Turnbull said

“At this point I would have to say yes, but it all depends on the budget that we’re given every year.”

[223] He added that if it was decided by Mr and Mrs Hills to send Christopher to school now on a full time basis, the “lead time” to identify and train a suitable teacher’s aide would be “possibly three months”, saying that if it was desired that Christopher starts school next year, then “I’d like to start the deliberations about September this year”.

[224] I have no hesitation in accepting Mr Turnbull’s evidence, that although he is unable to guarantee the availability of a teacher’s aide, he would support the provision of an aide. But he was frank enough to admit that there are other possible demands upon the relevant funds. Curiously then the State of Queensland argues that Christopher should receive nothing for this part of his claim because the State will provide the teacher’s aide, yet it has not called a witness to say so unreservedly.

- [225] The defendant's argument accepts that Christopher should have a teacher's aide throughout his school years. Its witness Ms McNamee said that Christopher should have a teacher's aide to assist him in the class room and to assist with his participation in the class room environment and that Christopher may benefit from additional tuition each term to cover the work that he may miss due to medical appointments or illness. Ms McNamee said that for tertiary studies, Christopher would not require the support of a special needs teacher and his general carer could assist with each of the tasks identified by Ms Pisk. But this was on the basis that the carer would have average to above average literacy and numeracy skills and in my view that should not be assumed. I accept Ms McNamee's view that *most* of the tasks which she has in mind for a special assistant during any tertiary study could be performed by Christopher's carer.
- [226] The defendant concedes that some allowance should be made for the prospect that Christopher will attend university. In that event the defendant concedes that it would be reasonable to allow for the services of an assistant for three and a half hours per subject per week for four subjects. Allowing a casual rate of \$20 per hour for 40 weeks per year, that equates to \$215 per week (over 52 weeks). Over four years and deferred for eight years that totals, the defendant says, \$27,585. The defendant says that this should be discounted by 50 per cent for the prospect that Christopher will not undertake tertiary study. I think the prospects of tertiary study are somewhat higher and I will allow \$20,000 for tertiary study.
- [227] From Mr Turnbull's evidence, most probably Christopher will have a teacher's aide. But there should be a substantial allowance for the prospect that this will not always occur during Christopher's schooling. The claim is made on the basis of an annual salary for a teacher's aide of \$45,000 plus superannuation of \$4,050 which equates to \$943.26 per week. Because the Department will probably provide the teacher's aide for most of the time, there will not be the cost for Christopher of employing someone on a full time basis. The plaintiff's submissions point to a number of circumstances going to the suggested unlikelihood of the Department's providing the teacher's aide. Notwithstanding each of those matters, Mr Turnbull's evidence, as I have said, indicates that the Department will probably provide a teacher's aide for at least most of the time. In my view it is reasonable to assess this component upon the basis that for two thirds of the time the school will provide the aide and the remaining one third would have to be paid for by Christopher. Ms Pisk said that the full time salary of a privately employed assistant would be \$35,000 to \$45,000. An amount of \$40,000 divided by three and expressed as a weekly sum is \$256.41. Over the next eight years that equates to \$88,717 which I will allow. I will not allow some further component for out of hours tuition. That need is likely to be offset by the prospect that there will be occasions when if there is no teacher's aide provided by the school, Christopher will be assisted for a day or so by his carer.
- [228] Accordingly the amount which will be allowed under this heading is \$108,717.

#### **Additional motor vehicle costs**

- [229] The plaintiff claims \$142,383.84 for what are said to be the additional capital and recurrent costs of a vehicle suitable for his transportation. The claimant relies upon the evidence of Mr Pallone, who compared the cost of a modified new Volkswagen transporter van with a five year old Holden Commodore. The van has a new cost of \$66,003 and the five year old Holden a cost of \$14,300. The plaintiff claims the

difference which is \$51,703. Mr Pallone then compared the recurrent costs of the van, which he calculated to be \$202.14 per week, with the costs for the Commodore which he calculated to be \$112 per week. That difference of \$90.14 per week is claimed over 58 years, resulting in a further component of \$90,680.84.

- [230] There is some double counting in the plaintiff's claim because the major contributor to the difference in recurrent costs is depreciation whilst the claim includes the extra capital cost of purchasing the van. The defendant argues that the claim for the increased capital cost should be reduced to allow for the resale value of the van, which after seven years is, I would accept, of the order of \$21,860. The defendant says this would represent the real difference in capital cost. Implicit in this argument is that the five year old Holden, after a further seven years, would have no substantial value. The defendant says that the loss might be measured by adding that net capital difference as a loss assumed to be incurred every, say, 10 years, before making further reductions for other circumstances. The principal circumstances put forward by the defendants are the prospect that the plaintiff would have acquired more expensive cars than five year old Holdens, the prospects of much higher repair costs for the older car, the prospect that Christopher would travel less than the average owner used for Mr Pallone's calculations and the fact that after depreciation is removed from the recurring expenses, there is an overall saving in recurrent costs in owning the van rather than the Holden. Further the defendant says that no amount should be allowed for the next eight years because Christopher will have the use of the family vehicle.
- [231] As to that last argument, Christopher has a present need for a specially modified vehicle. The fact that that need is likely to be met at least during his childhood by the use of the vehicle provided by his parents should not affect the assessment of the loss represented by this need. He should be compensated from now.
- [232] I do not accept that the comparison between these two particular vehicles is apt for assessing the loss over the whole of Christopher's life. I do accept that it is an apt comparison for an 18 year old. But someone earning above average earnings, as I have assumed Christopher would have been, would be likely to have a more expensive car than a five to 12 year old Holden Commodore. Mr Pallone's calculations require some discounting at least for that consideration.
- [233] I accept the defendant's approach, which is to look at the net extra capital cost calculated at certain intervals over Christopher's predicted life span. I accept also that the amount so calculated should be reduced for the lower running costs involved in a younger vehicle. But I will adopt intervals of seven years and not 10 years as the defendant suggests.
- [234] Taking Mr Pallone's capital difference of \$51,703, and subtracting the residual value of the Volkswagen of \$21,860, the capital loss becomes \$29,843. A loss of that amount now and then at seven yearly intervals (the last being at age 52) results in a present value of \$93,703. I accept the defendant's argument that the difference in fuel and general maintenance is \$18.57 a week which over the same period is \$17,307.
- [235] Subtracting that a net difference of \$76,396 is reached. This is much the same as an assessment which simply looks at the difference of \$90.14 per week calculated by

Mr Pallone and ignores his capital calculation because that \$90.14 includes depreciation. That amount of \$90.14 per week over 42 years is \$84,010.

- [236] Either of those amounts should be significantly discounted because the comparison with the older Commodore is not apt. In my conclusion the amount which should be allowed is \$60,000.

### **Additional holiday costs**

- [237] Ultimately it was argued for the plaintiff that he should receive \$275,630.92 for the extra costs he will incur in going on holiday. He has extended relations in the Netherlands and the United States of America and it is argued that he is likely to want to visit them often as well as to travel widely for his own enjoyment and experience. He has had already one experience of air travel interstate, which he enjoyed. He has also enjoyed his holidays with the family at the Sunshine Coast.

- [238] The evidence upon which his claim here is based is that of a travel agent, Mr Cook. He has prepared a report which sets out certain costs involved in travel within and outside Australia. Those costs are then employed in the plaintiff's argument with the assumptions that he will take Australian holidays involving domestic air travel and hotel accommodation for a fortnight each year and overseas holidays for three weeks every five years.

- [239] According to Mr Cook's report the extra cost of an annual holiday within Australia would be \$11,125.62, equivalent to \$213.95 per week. Mr Cook says that the extra cost of a three weeks overseas holiday would be \$46,141.63, which every five years is the equivalent of \$177.46 per week.

- [240] The defendant called Ms Williams, who operates a travel business that manages groups of travellers who are disabled. She is a former nurse. She says that Christopher is able to participate in specialised group holidays through her firm. She says however that Christopher would require a carer on a one on one basis which attracts a surcharge of approximately 75 per cent of the tour price. The prices of her coach tours within Australia range from about \$1,000 to \$1,500 for a 3 to 5 day tour. A fly-coach tour within Australia to, for example, Hamilton Island for five days, is \$2,995 and to Perth for eight days is \$7,999. Group tours to, for example Hong Kong or New Zealand, cost \$7,999.

- [241] I do not think that it is appropriate to assess Christopher's claim here on the assumption that he would participate only in group travel. There is some prospect that he would do that which warrants some adjustment to what is otherwise an appropriate figure. But in general he is likely to want to travel with his own carers and to have the independence of travelling alone, especially if he is going overseas to see relatives.

- [242] The claim here is excessive for a number of reasons. The first is that the assumptions which underlie it are unrealistic in my view. I do not think that his award should be calculated upon an assumption that he will in each and every year have a holiday in which he travels by air. It is more realistic to assume that he will make such a trip no more than once every three years. He is more likely to take holidays at a beach within driving distance of Toowoomba where he will be able to stay with his parents and/or carers in a rented apartment. In that respect he will

incur no cost until he is living independently of his parents or at least until he is 18. Mr Cook has compared the price of business class fares to Australian capital cities (and also Cairns) with the cost of a restricted economy fare from which he says that the average is \$1,873.28 for a business fare as against \$628.14 for the economy fare. The claim is then made on the basis of the difference between three business fares of \$1,873.28 each, and one economy fare of \$628.14, which is a difference of \$4,991.70. The claim is put upon the basis that both Christopher and two carers travelling with him must fly business class. I do not accept that premise. I do accept that it is reasonable to allow a business class fare for Christopher on lengthy international flights but for domestic flights Christopher ought to be able to fly economy class, with the assistance of his carers, just as he has already on a trip to Sydney with his father. Allowing two carers to accompanying him, that involves an extra cost \$1256.28 (2 x \$628.14).

- [243] Mr Cook compared standard accommodation costs in Australian capital cities with the cost of accommodation suitable for disabled persons. He says this involves a difference of on an average \$132.57 a night or \$1,855.98 over a fortnight's holiday. He then adds a second room at the same price for the second carer. I accept the defendant's argument that it is more realistic to assess the accommodation costs upon the premise that when travelling within Australia Christopher and his carers would rent an apartment. This would have the advantage of the two carers each being close at hand to assist with Christopher's transfers and other needs. I will allow an extra \$500 per week, or \$1,000 for the fortnight, for the extra cost of a larger apartment to accommodate three people rather than just Christopher.
- [244] Mr Cook says that the additional meals required for two carers would cost (over 14 days) \$2,521.96 (\$90.07 per carer per day). I think that is excessive. Many of the meals are likely to be cooked by the carers in the apartment. Allowing, say \$50 per carer per day results in an extra \$1,400. With the addition of \$1,256 for air fares and \$1,000 for extra accommodation I will assess the extra cost of a two week holiday within Australia, when this involves air travel, as \$3656. On the basis of that being incurred every three years, the equivalent weekly sum is \$23.43. Calculated over 36 years (from Christopher's 18<sup>th</sup> birthday) and deferred for eight years that amounts to \$14,036.
- [245] For the more common holidays taken at a local beach I will not make an allowance for extra meals. Christopher and his carers are unlikely to eat out more there than at home. The context is somewhat different from, for example, staying in the centre of another city where the carers would not have Christopher's vehicle, so that home cooking might be more difficult. I will allow something for the need for larger accommodation, although the difference for beach apartments. Allowing \$800 for that, for 2 years of every 3, the difference equates to a recurring cost of \$10.25 per week. Over 36 years and deferred for 8 years, that is \$6,144.
- [246] Turning to the claim in relation to international travel it is not reasonable to assess damages upon the premise of an overseas holiday every five years. The defendant says that overseas travel would be a once in a lifetime event. That probably understates the position. It is fair to assume that he will have three such trips and I will assess on the basis that they are taken when he is 25, 35 and 45.
- [247] Mr Cook has collected information on business class return fares to various cities in Europe, Asia, America and New Zealand. He has also collected economy fares for

the same destinations. But significantly they are economy fares without restrictions. The average of those economy fares is \$6,792. For example the unrestricted economy fare to Europe is said to be \$9,826. It is quite unrealistic to adopt that fare (as the fare for a second carer flying economy whilst the other carer flies business class with Christopher). I accept that the loss should be calculated upon the basis that Christopher and one carer fly business class but the other fare should be assessed upon the more common basis of a restricted fare.

[248] The fares given by Mr Cook have no doubt been faithfully extracted from certain quoted prices but they do seem to be high. For example, he uses \$15,603 for a business class return fare to the USA and \$13,285 for a return fare to Europe. I will instead adopt \$6,000 as an average business class fare to those various destinations (which include e.g. Auckland) and \$2,000 as the more relevant average economy fare to those same places. This means that Christopher would be spending an extra \$4,000 for his having to fly business class internationally, the cost of one carer flying business class with him at \$6,000 and another flying economy at \$2,000. Mr Cook has said that the average restricted economy air fare is \$2,198.37. But I will adopt \$2,000 because Christopher and his carers would be more likely to obtain a lower fare by being able to book well ahead (through Christopher's not being employed) and being able to travel at the less busy times.

[249] Mr Cook has then calculated the cost of accommodation for two carers (but not for Christopher), when travelling overseas for 21 days, as \$18,740. Again I am not persuaded that that is a reasonable estimate. At least one of the carers would occupy a room with Christopher so the cost is effectively one extra room. On Mr Cook's estimate the cost is \$446 per day per carer. I would allow instead effectively an extra room plus some extra charge for the room occupied by Christopher for the carer's use of it. It is reasonable I think to allow an extra \$500 per day which over 21 days is \$10,500.

[250] As for meals overseas, Mr Cook says that \$90 per carer per day should be adopted, which comes to \$3,780 for two carers over 21 days. I will accept that figure. The extra costs I will allow for an overseas trip are then \$12,000 plus \$10,500 plus \$3,780, which is in total \$26,280. Deferred for 15 years that is \$12,640, deferred for 25 years it is \$7,748 and for 35 years it is \$4,764. The total of those three figures is \$25,152. I will allow \$24,000 for the extra cost of overseas travel having regard to the prospect that Christopher might take up the cheaper alternative of group travel.

[251] The result is that I will allow \$44,180 (\$14,036 + \$6,144 + \$24,000) for the extra cost of travel.

### **Case Management**

[252] The plaintiff's claim here is \$331,980, which is the present equivalent of \$330 per week over 58 years. That weekly figure is for a so-called case manager at \$150 per hour plus GST for an average of two hours per week. The claim relies most heavily upon the evidence of Mr Kennedy-Gould, a social worker.

[253] The specific tasks of this case manager, according to Mr Kennedy-Gould would be that in consultation with Christopher's parents and eventually his sister, the case manager would attend to:

- “1. The development of care plans and associated recording systems however as well as care protocols e.g. emergencies, skin care, exercise, manual handling and activity, leisure and education programmes ... a case manager would be required to ensure that all staff working with Christopher are aware of occupational health and safety requirements (applying to them) and competent in the use of appropriate technology and assistive devices.
- ...
2. The recruitment, induction and ongoing supervision of staff according to the above protocols. This would involve arranging education of all necessary specialist staff to ensure best clinical practice in Christopher’s care.
3. To ensure the implementation and review of all medical and allied health therapies.
4. (The performance of) an essential role in ensuring that there is regular flow of information between all those involved in Christopher’s care whether clinicians or personal carers.”

[254] The appropriate qualifications for this person, according to Mr Kennedy-Gould, are:

“Qualifications in the fields of social work or occupational therapy with extensive experience in the field of acquired brain injury and the complex sequelae of medical conditions such diabetes and... demonstrable expertise in clinical skills and theoretical currency.”

[255] Other witnesses, including Ms McNamee, who was called by the defendant, agreed that some case management was necessary. But there were different views as to how much was required and as to the necessary level of qualification of the manager. Mr Kennedy-Gould suggested two hours per week, as the plaintiff claims. Ms Stephenson suggested five hours a week but said that the necessary qualification was much lower, so that rather than the manager being paid \$150 per hour (Kennedy-Gould) the hourly rate would be about \$30. Ms Robertson, suggested four hours for the first four to six weeks and then two hours per fortnight or four hours per month thereafter. She said the cost of a visiting case manager provided by her agency is \$150 per hour and as to their qualifications, that “they are often registered nurses or people who have worked extensively in social work, rehabilitation or other medical fields”. Dial-an-Angel charges \$79.50 per hour (for the first two hours followed by \$26 per hour thereafter) for the attendance of a nurse. In her report, Ms McNamee said that one to two hours per fortnight would be sufficient but in cross-examination she agreed with a figure of two hours per week.

[256] The defendant argues that there should be either no allowance for case management, or else an allowance calculated at one hour per week at \$30 per hour and then discounted for the prospect that Christopher’s parents will carry out this role.

- [257] Mr Hart said that the QLS rates include the provision of case management services. QLS currently employs two co-ordinators with “higher level” qualifications, who have a responsibility in the co-ordination and training of the carers. He said that in a 24 hour care regime such as this, case management of this kind could involve up to six hours of (included) co-ordination per week.
- [258] I have earlier concluded that a regime of managed care and not referred care, is more appropriate in Christopher’s case and I have assessed the cost of future care upon that basis. That is relevant to the present question. Much of the work of a so-called case manager would involve the co-ordination of carers. Under a regime of managed care, that work is largely done by the agency, which is one reason why it is more appropriate for Christopher’s case. On the other hand, one of the reasons for a case manager is to have the help of a person, who is independent of the care agency, so that Christopher can receive independent assistance and advice in his dealings with the agency. Because Christopher will be so dependent upon the individuals who provide this care, and upon the agency which provides those carers, he will be especially vulnerable to conduct which is not in his best interests and he needs the support of an independent person to take up his cause if he feels that something is awry.
- [259] I am not persuaded by Mr Kennedy-Gould’s opinion as to the required qualifications of this person. Christopher will have the services of other health care professionals, to whom he can go if and when they are required. I do accept that the case manager should be better qualified than the average carer, notwithstanding Ms Stephenson’s view. A registered nurse is an appropriately qualified person in my view. He or she would have the necessary professional training to understand the range of medical and health services available to and likely to be required by Christopher. And regular visits by a registered nurse would also provide the nursing assistance as discussed earlier. Yet Mr Kennedy-Gould rejects the suggestion that a nurse could perform this role. He says that his experience with nurses as case managers has been that there is “a tendency to set up a clinical regime rather than a home care regime” and that “the great task of a case manager is to prevent or militate against the development of a mini-institutional situation”. I am not persuaded by his evidence in that respect. Two things must be kept in mind. For all of the difficulties there are and will be in Christopher’s life, he has no cognitive disability and is at least of average intelligence. Secondly he will be able to communicate, orally and by his computer. As an adult he will largely be able to manage his own affairs, including his health care. He will need the assistance of an independent person, acting as his so-called case manager, to facilitate his dealings with his care agency and with other assistants. A registered nurse could well perform that role and his or her regular visits, as I have said, would have the advantage of providing regular nursing attention.
- [260] The defendant argues that any award should be discounted for the prospect that Christopher’s parents will perform the role. Whilst Christopher is living at home he will not require a case manager because he will be less vulnerable in the sense which I have described. The involvement of his parents and in all likelihood his sister and other family members as he lives independently will also tend to reduce the prospect that he will be improperly treated by a carer or an agency. That is not to say that I would assume his parents will act as case managers so that he will not have any need of this kind.

- [261] Under a regime of managed care, he should need no more than two hours per week on average of case management. I will adopt Ms Robertson's rates for a registered nurse of \$79.50 per hour. Calculated from when Christopher is 21 and deferred for 11 years, that equates to \$79,580. For the next 11 years I will allow something for the attendance of a registered nurse. Allowing one hour per fortnight over 11 years results in \$17,649. I will allow in total for a case manager, and nursing care the amount of \$97,229.

### **Out-of-pocket expenses**

- [262] Out-of-pocket expenses have been agreed at \$60,000 and interest on them at \$15,000.

### **Funds management**

- [263] Section 59 of the *Public Trustee Act* 1978 (Qld) provides that no money or damages recovered or awarded in respect of a claim by a person under a legal disability should be paid to any person other than the Public Trustee unless the court otherwise directs<sup>21</sup>. It further provides that all money or damages so paid to the Public Trustee shall, subject to any general or special direction of a court, be held and applied by the Public Trustee on trust for the person under a legal disability and that the Public Trustee then has the powers there expressed.<sup>22</sup> If Christopher's award is paid to the Public Trustee pursuant to s 59, the Public Trustee is authorised to charge fees and charges fixed pursuant to the *Public Trustee Act*. There is no evidence as to the present level of fees chargeable under that Act. But the defendant concedes that the amounts which could be charged, and which would be likely to be charged by the Public Trustee are those which would be charged by Perpetual Trustees Queensland Limited were it to be appointed to administer the fund.
- [264] Perpetual's fees and charges are proved by the evidence of Mr Gallagher from Perpetual. Anticipating that Mr Hills, as Christopher's litigation guardian, will apply to have the award paid to Perpetual and not to the Public Trustee, the defendant argues that there is no power to appoint Perpetual, or anyone other than the Public Trustee, as a trustee. This is said to come from the proper interpretation of s 59. The defendant argues that if I were to direct the award to be paid to Perpetual I should not allow anything for funds management because s 59 does not give power "to appoint a trustee or even to create a trust" (other than by the appointment of the Public Trustee). If I upheld that argument I would not appoint Perpetual. So if I am persuaded to appoint Perpetual it will be upon the basis that it is a trustee and is entitled to charge commission and fees as a trustee company, the right to which is regulated by the *Trustee Companies Act* 1968 (Qld). There is no suggestion that the various commissions and fees according to Mr Gallagher's evidence are inconsistent with that Act or any other law which might affect Perpetual's right to charge commissions and fees when administering this trust fund for Christopher. Alternatively if I appoint the Public Trustee, then as already mentioned, the defendant concedes that Mr Gallagher's evidence sufficiently establishes the likely administration fees which would be charged.

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<sup>21</sup> s 59(1)

<sup>22</sup> s 59(4)

- [265] Accordingly a least until Christopher turns 18, there will be a need for a fund to be administered by a trustee with a consequent cost as indicated by Mr Gallagher's evidence. As the defendant also concedes, that cost is a loss for which Christopher must be compensated.
- [266] I was also informed by the plaintiff's counsel that Mr Hills would not seek to have any part of the award paid out to any person other than the nominated trustee, other than the agreed amount of out-of-pocket expenses and interest on them, i.e. \$75,000. The defendant then agreed that I could assume that the funds under administration would become the amount of the award less \$75,000.
- [267] So far as the allowance for funds management for the period of Christopher's minority is concerned, there is then one remaining issue, which concerns the tax deductibility of some of the fees which would be charged by a trustee. Before going to that, it is necessary to summarise Mr Gallagher's evidence about Perpetual's fees.
- [268] There are three relevant fees. The first is an establishment fee charged by Perpetual at the rate of 0.65 per cent of the initial investment, capped at \$35,000. The second is Perpetual's so called ongoing management fee, charged at these rates:

0 to \$500,000	1.925%
\$500,000	1.375%
\$1,000,000	0.825%
Funds greater than \$2,000,000	0.65%

Thirdly, there are investment management fees charged by third parties to Perpetual. These include brokerage paid to stockbrokers. On various assumptions as to the mix of managed funds and direct investments and as to rates of third party fees and brokerage (none of which are challenged) Mr Gallagher says that the third party investment fees can be assumed to be 0.018 per cent of the (original) capital. In turn Mr Gallagher makes certain assumptions as to the rate at which the fund is used for the maintenance and welfare of Christopher. He assumes, in effect, that Christopher will draw upon the fund at an even rate. (Although his initial drawings are likely to be relatively lower during his childhood so that assumption favours the defendant.)

- [269] Returning to the question of tax deductibility, Mr Gallagher says, and the defendant agrees, that Perpetual's ongoing management fee would be deductible but not the other fees. Mr Gallagher's report calculates a tax deduction upon the fee at various levels of income and in turn provides a calculation of the net present value of Perpetual's fees after allowance for that tax deduction. In that calculation Mr Gallagher assesses the tax deduction by looking at the tax which would be paid on the earnings which he has assumed for this report, which are five per cent per annum of the capital sum. The total income tax on those assumed earnings can then be expressed as a percentage and it is that percentage which Mr Gallagher has applied to the Perpetual ongoing management fee to reach his total after tax cost of funds management.

- [270] There seems to be no argument on the plaintiff's behalf that there should be no consideration of the tax deductibility of these fees. Mr Gallagher was called in the plaintiff's case and his report details the tax effect upon the cost of this funds management. The particulars of the plaintiff's claim in this respect were formulated by reference to an earlier report of Mr Gallagher which was not tendered. It seems from the amount there claimed, when compared with the current report, that the plaintiff was accepting that an allowance had to be made for the tax deductibility of these fees. No contrary argument was advanced in the oral or written submissions of the plaintiff. The issue instead is one of the extent of that allowance.
- [271] The defendant argues that an allowance should be made at the top marginal rate for personal income tax, rather than effectively at an average rate as Mr Gallagher has calculated. In my view the defendant's argument should be accepted. The plaintiff's need requires the expenditure of money, and the expense is a loss of which the defendant's negligence was the cause: *Willett v Futcher* [2005] HCA 47 at [10]. The expense to the plaintiff should be measured by accounting for the tax deduction which this expenditure will provide. Mr Gallagher's evidence, and in turn the plaintiff's case in this respect, assumes that the fund will result in assessable income of the order of five per cent of the capital. So the deductibility of the relevant portion of Perpetual's fees will affect the true expense according to the top marginal tax rate. Mr Gallagher's report was apparently based upon the previous tax rates before those introduced in the last Budget, so that the difference between his figures and what would follow from the use of the top marginal rate is somewhat less.
- [272] Otherwise I will adopt Mr Gallagher's evidence as to the likely fees by Perpetual or another trustee. The result is that upon the award of \$5,140,782, which is the total of the other components of this judgment less \$75,000 for out-of-pocket expenses, the present value of the relevant fees before allowance for tax deductibility is \$419,124. That includes what Perpetual calls its ongoing management fee in the sum of \$293,585<sup>23</sup>. Allowing for a tax deduction on that at the rate of 45 per cent, the sum of \$132,113 should be deducted. The result is that I assess the present value cost of the necessary administration and management of Christopher's award until he is aged 18 at \$287,011.
- [273] The report of Mr Gallagher made similar calculations for the ongoing administration of the fund over the rest of Christopher's life. Yet Christopher has no need for that service after he turns 18. He has no impaired intellectual capacity and he has no need to have others administer his financial affairs for him.
- [274] But it is argued for the plaintiff that there will be some additional expense which will result from Christopher's physical disabilities.<sup>24</sup> The difficulty for the plaintiff's case is that there is no evidence as to the financial consequence, if any, of the plaintiff's physical disabilities upon the cost of the management of his money. Faced with this problem, those arguing the plaintiff's case assert that there should be an allowance for a global sum "based on as fair and reasonable assessment as the court thinks possible". Ultimately it is submitted for the plaintiff that an additional global award "of the order of \$200,000 is reasonable for the period from age 18".

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<sup>23</sup> \$287,785 (on \$5,000,000 per table on page 7 of Mr Gallagher's report) plus \$140,782 x .0412 (marginal rate for this fee: same table)

<sup>24</sup> see *Willett v Futcher* [2005] HCA 47 at [11]

- [275] There is no basis for that claim. Christopher will be able to make his own decisions about his money. He will be able to engage his own advisers and do his own research. He will be able to give instructions to those who assist him. In particular he will be able to use the internet and emails. He will be at some disadvantage in communicating with his advisers, at least by the telephone. But I am not persuaded that this will involve some extra expense. It is argued that Mr Gallagher gave an example of how that could occur when he said that Perpetual would not usually take email instructions from the plaintiff. It is said that “this problem would obviously lead to avenues of expense not definable at this time but nevertheless real”. I do not accept that argument. I accept that there would be inconvenience but not further expense at least in any amount which justifies a further allowance within this award.
- [276] Accordingly the claim for so called funds management from age 18 onwards will not be allowed. The total amount allowed under this head will be \$287,011.

### **Conclusion**

- [277] The plaintiff will have judgment for \$5,502,793 which is calculated as follows:

General damages	\$220,000
Interest on past general damages	\$9,000
Future loss of earning capacity	\$519,226
Past gratuitous services and care	\$255,500
Interest on past gratuitous services	\$63,875
Future care	\$2,970,136
Home modifications	\$77,307
Hydrotherapy pool	\$40,000
Home maintenance	\$53,360
Housekeeping and cleaning	\$36,036
Therapeutic aids, appliances and equipment	\$215,276
Maintenance on aids, appliances and equipment	\$9,440
Technology issues	\$252,250
Future medical treatment	\$7,438
Future paramedical treatment	\$77,521
Future pharmaceutical costs	\$24,291
Additional education costs	\$108,717
Additional motor vehicle costs	\$60,000
Additional travel costs	\$44,180
Case manager	\$97,229
Out of pocket expenses	\$60,000
Interest on out of pocket expenses	\$15,000
Funds management	<u>\$287,011</u>
 Total	 <u>\$5,502,793</u>

I will hear the parties as to further orders, including as to costs.