



Neutral Citation Number: [2024] EWHC 1406 (KB)

Case No QB-2020-001662

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 10 June 2024

Before:

MARAGRET OBI

(Deputy High Court Judge)

Between:

FXS

(through his father and litigation friend JLM)

Claimant

- and -

THE MULBERRY BUSH ORGANISATION LTD

Defendant

Amelia Walker (instructed by **Leigh Day**) for **FSX**
Catherine Foster (instructed by **DWF**) for the **Defendant**

Hearing Dates:

2, 3, 6 and 7 February 2023; 22 and 23 June 2023; 1, 2 and 5 February 2024; 7 March 2024

Draft Judgment Circulated on 5 June 2024

Approved Judgment

Ms Margaret Obi:

Introduction

1. The issue of anonymity was raised after the hearing had concluded. FSX invited the Court to grant anonymity and no objection was raised by the Defendant. FSX is an adult. However, he lacks the capacity to litigate. Therefore, these proceedings were brought through his father as his Litigation Friend. The evidence in this case involves sensitive matters relating to FSX's private family life and the involvement of social services. In my judgment, notwithstanding the importance of open justice, non-disclosure of FSX's identity is necessary to secure the proper administration of justice and to protect his right to respect for his private life. In these circumstances, I made an anonymity order. To protect FSX's identity by association, I have referred to members of his family solely by their relationship to him save for his father who is also referred to by a cypher - JLM.
2. This judgment follows the trial on liability and quantum in respect of FSX's claim for damages. The trial was originally listed for 5 days. In the end, it took 9 days, and the oral evidence was heard in three different tranches over the course of a year. As a consequence, in producing this judgment, I relied on the transcripts of the evidence in addition to my notes.
3. FXS is a young man (now aged 25) with a diagnosis of Autism Spectrum Disorder ('ASD') and a mild learning disability. He experiences difficulties with communication and anxiety issues. The Defendant is a charity and a private limited company which runs the Mulberry Bush School ('the School'). The School is approved by the Department for Education (DfE) as a non-maintained special school which provides 38 weeks of residential care and education, as well as day placements for children aged 5-12 years who have experienced severe emotional damage in infancy and early childhood.
4. On 19 June 2008, in emergency circumstances, FSX was placed at the School by the London Borough of Camden Children's Social Services ('the Local Authority'). It was a residential placement. At that time and throughout his attendance at the School, FSX was "*looked after*" by the Local Authority in accordance with section 20 of the Children Act 1989. FSX was aged 9 at the time of the placement. He remained at the School until September 2009 when he was withdrawn by JLM, who had obtained parental rights in May 2009. FSX had just turned 11 when he left the School. As will emerge, it was put to JLM during the hearing that he took to "*took to disappearing*" from his son's life for significant periods and when he re-engaged after FSX's placement at the School, he formed the view that his son was in the wrong educational establishment. He wanted his son to attend a school for autistic children and believed that the placement "*was inappropriate in every conceivable way.*"
5. The Ofsted inspection reports for the period before, during, and after FSX's placement (dated 6 March 2008, 11 March 2009 and 4 February 2011) all graded the School as "*Outstanding*". However, as Ms Walker emphasised, this case was not about the overall effectiveness of the School, or its ability to meet the needs of children with challenging behaviours. It was about whether something went wrong in the care the School provided to FSX. He alleged that the School:

- i. acted negligently and in breach of its duty by (amongst other things) restraining him frequently and with excessive force; inappropriately confining him to his room; and failing to manage his behaviour appropriately.
 - ii. further, or alternatively, assaulted him during the restraints and/or the acts of restraint constituted battery and/or trespass to the person; and
 - iii. falsely imprisoned him, on at least two occasions, by placing a towel in the doorway of his room to prevent him from leaving.
6. The Court was only provided with a partial picture of the events that took place after FSX left the School. Based on JLM's witness statement (dated 1 October 2021), there was a gap in FSX's formal education from September 2009 until August 2010. He attended the Portfield School in August 2010. However, by December 2010 he had been permanently excluded. He subsequently attended the Aran Hall School for a brief period. On 28 November 2013, FSX was admitted to Cruckton Hall School and remained there for a few weeks but then refused to return to the school after the Christmas holidays.
7. FSX was admitted to St Andrew's Hospital (St Andrew's) on 19 September 2014 under section 2 of the Mental Health Act 1983. At the time of his admission, he had just turned 16. He left St Andrew's in or around August 2016. On 19 September 2016, aged 18, FSX was admitted to the Springs Unit at the Cygnet Hospital which provides support to service users with autism and learning disabilities in a low secure setting. He left the Springs Unit, around March 2019, and he is currently living in supported accommodation. It was not alleged that FSX suffered any psychiatric injury as a result of his experiences at the School. It was his case that the School's mismanagement of his needs "*more than minimally contributed*" to his eventual placement within a hospital setting.
8. JLM initially made a complaint against the School to Oxfordshire County Council. Neither JLM nor FSX were interviewed as part of the investigation but senior staff members, Thames Valley Police, and the Local Authority social work team were consulted. There was no evidence before me as to the nature and scope of the investigation or what records were taken into account. The complaint was dismissed in October 2009. In November 2009, JLM and FSX's mother made a disability discrimination claim to the First Tier Tribunal (SEND) ('the Tribunal') on behalf of FSX. The hearing took place on 28 April 2010. It was claimed that the strategies used to manage FSX's behaviour were not appropriate and the School had failed to make reasonable adjustments to his educational provision despite being aware of his autism diagnosis. The claim form included a list of sanctions (including separation and restraint) but there was no indication that the Tribunal had sight of all the incident records and there was no analysis of the incidents which were the subject of this claim. The Tribunal concluded that there was no unlawful discrimination, and the claim was dismissed.

Background

9. For the allegations (and the responses to them) to be understood and resolved it will be necessary to set out the background in some detail. This is a case in which much had to be gleaned from the School's records. FSX's residence at the School was well documented. Therefore, the trial bundle contained extensive correspondence, records (including medical

records, incident daily logs, and reports) and policies. The recollection of the staff members was variable and not all those who had regular contact with FSX whilst he was at the School were called or even identified. However, I believe that the parties referred me to every document they considered material to their case, and I am satisfied that the documentary evidence, supplemented by the explanations offered by the witnesses, enabled me to form a fair picture of the key events.

10. The background summary (as set out below) is based on the documentary evidence referred to above and the witness statement of JLM. I was greatly assisted in this endeavour by the skeleton arguments of Ms Walker and Ms Foster.

Key Events Prior to Admission to the School

11. JLM stated, in his witness statement, that FSX was diagnosed with ASD just after his 6th birthday. Dr Anastasia Haehnelt - a Locum Consultant Paediatrician, in a letter dated 27 September 2004, stated that she “*strongly felt*” that FSX had ASD and made a referral for him to be assessed at a child development centre. In a letter, dated 29 September 2006, Dr Wendy D’Arrigo - a Consultant Paediatrician, referred to a diagnosis of ASD. This appears to have been based on her belief that a diagnosis had been made in 2004. An Educational Psychology report from Sophie Levitt, dated 30 November 2006, FSX’s Statement of Special Educational Needs (SEN), dated April 2007, and an assessment by Dr Hayes from the Camden NHS Trust, dated 13 November 2007, all refer to ASD. However, none of the letters or reports diagnose autism. Therefore, I am satisfied that no formal diagnosis of ASD had been made prior to FSX’s admission to the School.
12. In March 2007, FSX attended the Netley ASD Resource Base (‘Netley’) which was within a mainstream primary school. In March 2008, an annual review report from Netley stated that FSX was:

“...different from the intake at Netley in that he is a very sociable outgoing little boy and no way in his own world. ...[He] has exhibited some very concerning behaviours at school. These include threatening to hurt other pupils and their parents, throwing and smashing objects in temper and teasing his peers relentlessly. [He] talks of his feelings a great deal and has expressed unhappiness and fear. ...I feel his emotional needs can only be met with specialist input that is beyond the level we can offer.”
13. During this period there were difficulties within FSX’s home environment. JLM stated in his witness statement that he separated from FSX’s mother in March 2007 and moved to Scotland. He stated that he now knows that in his absence, FSX’s mother found it increasingly difficult to cope on her own with FSX and his sister. At that time FSX’s sister was 4 years old. He referred to an incident where FSX took his sister out of the house in the early hours of the morning whilst his mother was sleeping. FSX left his sister on the street. JLM believes that this incident took place in April 2008. However, the School’s referral application form states as follows:

“Following an incident whereby [FSX] took his younger sister into the street during the night and left her there, a network meeting was held (on 17/03/08) and, during

this meeting, [FSX's] mother was clear that she was no longer able to care for [him]."

This strongly indicates that the incident involving FSX's sister occurred no later than the middle of March 2008.

14. In February 2008, FSX and his sister were placed on the Child Protection Register as they were considered to be at significant risk of harm based on neglect. FSX stayed with JLM in Scotland from 15 March 2008 to 19 April 2008, after which they moved to a hotel in London. JLM returned FSX to his mother's care in April 2008, but she felt unable to manage him. On 25 April 2008, FSX was placed into temporary foster care. This placement eventually broke down as the carers were not able to meet his needs.
15. On 8 May 2008, an Initial Child Protection Conference was held, and FSX and his sister were made subject to a Child Protection Plan under the category of emotional abuse. The minutes of the Initial Child Protection Conference record that FSX's social worker - Ms Farrah McKenzie ('the social worker') stated that "*she did not feel that all of [FSX's] behaviour was down to his autism*". She also stated that "*...[FSX] seems to have a fixation on his father and will do what he can to be with him.*" The social worker also observed that FSX was trying to "*sabotage*" his foster placement because he wanted to live with his father. JLM was not present at the meeting but provided a written statement in which he stated:

"...I feel it would be incredibly difficult to take [FSX] on full-time without considerable help and respite, because of his extremely exhausting and challenging behaviour."

FSX's maternal grandmother also provided a written statement (dated 6 May 2008) in which she stated that from when FSX was 3 or 4 years old JLM "*took to disappearing*" for various periods. For example, on one occasion, he was taking something to the local rubbish dump but "*wasn't seen again for two weeks*". Then when FSX's sister was born, he "*vanished without warning or trace for a period of two months*". She stated that the pattern of "*disappearing*" continued and she expressed the view that FSX had become traumatised as a result of his father's behaviour.

16. The Initial Child Protection Conference report stated that "*[m]any of [FSX's] traits are not classically Autistic and he is in the process of being re-assessed.*" The anticipated outcome was that FSX would receive appropriate therapeutic care and live in a stable environment with regular and meaningful contact with his family.

Admission to the School and Initial Assessment

17. Angus Burnett (Head of the Family Team at the School) visited FSX at Netley in June 2008. FSX was assessed as being a suitable referral and on 19 June 2008, he was admitted to the School. A "Getting to know you meeting" was held on the same day with FSX, his mother and a number of professionals. JLM was not present at this meeting. An initial 12-week assessment was undertaken by the School, which was interposed by the summer holidays.
18. On 11 July 2008, FSX was assessed by Laverne Antrobus, Consultant Child, and Educational Psychologist, who was employed by the School. Ms Antrobus concluded in her report that

FSX would require “*focused teaching/attention*” to ensure that he made progress. Recommendations were made to assist his teachers and a referral was subsequently made to Oxfordshire Social Services for speech and language therapy.

19. On 14 July 2008, a Camden Family Group Conference took place. JLM was not present at this meeting. As it was not deemed suitable for FSX to live with his mother during the school holidays, for reasons of safety, it was anticipated that JLM would care for him. A Child Protection Review Conference was held on 15 July 2008. JLM was not present at this meeting. Concerns were expressed at the level of hostility between the parents. Whilst FSX was living with his mother, pending his placement being finalised, his behaviour was described by the social worker as difficult, unpredictable and violent. As a result containment and restraint had been required. In the summary of the minutes, it was noted that FSX was doing well at the School, had responded to the tightly structured environment and “*so something along these lines would have to be organised for the summer.*” One of the recommendations was that FSX should remain at the School for the assessment period.
20. The summer term ended in July 2008. FSX spent the holidays with JLM. A letter was sent to JLM in advance of the summer break highlighting some of the work that had been done during the term. It was anticipated that this would help JLM to support the School.

Attendance at the School from September 2008 to September 2009

21. FSX returned to the School after the summer break. A Looked After Children Statutory Child Care Review Meeting (LAC Review) took place. The date of this meeting is unknown. This is because the minutes bear the date 16 August 2008, but this must be incorrect as the content of the report refers to a meeting between JLM and FSX’s mother on “*3rd September*”. JLM was not present at this meeting. Difficulties had arisen over the summer holidays and assistance was required from the police to ensure FSX returned to the School. However, it was noted that FSX was making some progress with his education, and he had begun to settle in after the holidays. It was thought that his behaviour was not necessarily that of an autistic child. It was recorded that the School assessments would “*look at issues of autism as a more holistic assessment*” and there was some discussion about the need to review his diagnosis. The minutes also state:

“With regards to JLM’s commitment to [FSX], it was reported he has visited [FSX] at school along with his paternal grandparents. The visit went very well although it was pointed out that [FSX] cannot be told too far in advance of any of these appointments taking place. [FSX] engages with his father and enjoys these visits... [FSX] has a good attachment to his father and both parents have engaged well in the work that has taken place.”

22. The notes from a target-setting meeting at the School on 30 September 2008 state as follows:

“All the staff teams working [with FSX] seemed to have experienced some degree of confusion about [FSX’s] suitability for this placement and our ability to meet his apparently very particular needs. This appeared as discussion about autistic features and about which household he should join. ...What seems clear is that [FSX’s]

difficulties impact on people around him powerfully, and that there may be a tendency to rationalise a drive to distance oneself from grappling with [FSX's] difficulties. Given a clear space to think in [sic] the treatment team were rapidly able to be clear that [FSX] is a suitable placement and that they believe that his needs can very effectively be met at [the School]."

23. A LAC Review took place on 25 November 2008. JLM was not present at this meeting. FSX's ASD assessment was "ongoing". The social worker had spoken to the Tavistock Clinic and had been informed that they had closed their case. She was redirected to Child and Adolescent Mental Health Services ('CAMHS'). As FSX did not reside in Camden, it was stated that this would be dealt with by CAMHS in Oxfordshire. However, it was noted that this would not be viewed as a priority. The minutes of the meeting record that the care plan was for FSX to remain at the School. It was thought that FSX had been "quite successful" within the context of the 38-week placement and that he would "perhaps manage with a foster placement in between these times." It was noted that FSX had settled into the class and "was achieving well but has good and bad days". He needed to have clear boundaries and simple explanations and was benefiting from structure and the use of visual timetables. It was also noted that he had been assessed by the Speech and Language Therapist and the Educational Psychologist who had "not yet picked up on anything specific".
24. A Child Protection Review Conference took place on 11 December 2008. JLM was not present at this meeting. The social worker noted that holiday and weekend arrangements were not satisfactory and that it had been difficult to make contact with JLM to find out what was happening. She reported that JLM felt he was no longer able to care for FSX during the holidays and noted that at the end of November, FSX had stayed at a respite facility. The Christmas holidays were due to commence the following week and no placement had yet been found. However, it was reported that FSX was "making progress in the home situation and in class. People are pleased and can see huge progress". It was also reported by Ms Jessica Delicita, the School social worker, that "It is important to find out the level of [FSX]'s Autism in order to meet his needs."
25. FSX returned to the School after spending the Christmas holidays at a respite facility. Although FSX had stayed with JLM during three school holiday periods, he had not seen JLM over the Christmas holidays.
26. An integrated treatment plan ("ITP") was put in place. This was a live document. The ITP (April 2009 version) sets out the objectives from FSX's SSEN. FSX's significant achievements and progress were noted, there was a risk assessment, and targets were set. The ITP also included a detailed progress review and practice guidance report. The same format was followed in the updated ITP of September 2009.
27. In May 2009, FSX was assessed by Dr Chapman, Consultant Psychiatrist. This is the first record of a formal diagnosis of ASD. Dr Chapman's report dated 7 May 2009 states:

"There is a history of behavioural disturbance from a young age with social impairments, communication impairments and restricted interests. The onset of these difficulties has occurred prior to three years of age."

[FSX] has an autistic spectrum disorder. His presentation is consistent with an individual at the higher functioning end of the autistic spectrum... . Additionally, [FSX] has significant behavioural difficulties, and this makes for a very complex presentation. It can be common for children exhibiting this severity of behavioural disturbance to have a coexisting emotional disorder. It has been challenging gaining access to [FSX's] internal world so I can make no formal diagnosis of an emotional disorder, although I feel it is likely that there is coexisting emotional disturbance and that he probably worries on regular basis (sic), particularly when there is uncertainty.

Behavioural support needs to be quite specialised if it is to meet all areas of [FSX's] needs. ...

I feel that behavioural interventions through his school environment are most likely to produce an improvement in his behaviour. It is unlikely that he would respond to any direct therapeutic intervention from our specialist CAMHS at present”.

28. From the beginning of 2009 JLM had begun to raise concerns about the School's treatment of FSX and the management of his needs. He stated in his witness statement that when FSX first came to visit him during the holidays, he was shocked to see bruising “*all over [FSX's] arms*”. FSX complained about the restraints staff performed on him. When JLM raised this issue with the School, he was told that children displaying dangerous behaviours needed to be controlled. JLM stated that in May 2009, when he visited the School for a LAC Review, he found FSX to have very “*obvious and significant bruises*” on both of his arms. The records confirm that the LAC Review took place on 18 May 2009.
29. The Chair of the LAC Review met with FSX and his independent advocate - Amandeep Thind prior to the meeting on 18 May 2009. FSX stated that he hated the School, wanted to live with his father and wanted to go to a normal school. He became quite agitated and asked to leave the room. It was noted that the prospect of a LAC Review was anxiety-provoking for him and when he became aware of a review, his behaviour tended to deteriorate. It was also noted that there had been difficulties arranging respite for FSX and that he was attending Ashley Residential Home (‘Ashley’) at weekends. During the meeting, the content of Dr Chapman's report was discussed. FSX's bruises were also discussed, and the plan was that the School would “*look into this*” and report back. However, the School later acknowledged in correspondence, dated 17 September 2009, that this issue was not investigated for some four months. JLM stated in his witness statement that a doctor's appointment was delayed until September 2009 and by then the bruising was no longer visible.
30. During the LAC Review meeting the Local Authority took the view that FSX should remain at the School for the next academic year and spend the weekends and breaks at Ashley, and then work on building a positive and consistent relationship with his father. JLM had by this time obtained parental responsibility for FSX. He did not agree with the School's plan. It was his view that FSX should be in a school that specifically provided for ASD. The records indicate that both parents believed that FSX's behaviour was related to his ASD and not particular emotional or behavioural difficulties. It was recorded that JLM had already identified a suitable day school in London (which would be able to take FSX until the age of 16) and stated that he would have a flat to move into by July 2009. The Local Authority expressed some unease about this plan; it was thought that FSX would not be able to manage

a day school. There was also a concern about the changes and inconsistencies that FSX had experienced. It was stated that FSX “...*would benefit most significantly from a highly structured environment.*” JLM queried whether the School was always aware of FSX’s ASD. The record of the meeting indicates that JLM was informed that the School was aware from the outset but initially, it was an “*unconfirmed diagnosis*”. JLM also queried whether any other children at the School had ASD. He was assured there were other children at the School with that diagnosis and that many of the approaches used at the School were similar to those used in autistic spectrum-specific schools (for example, visual timetables, input from speech and language therapists, paediatricians and occupational therapists). The School also confirmed that they had a teaching assistant who was experienced in working with autistic children. It was noted during this meeting that FSX had picked up that he might be moving in with his father and that this was causing problems with his behaviour. The minutes of the meeting record that FSX “... *functions well when he knows exactly what is going to happen, but a sense of uncertainty has now been introduced. In the last two weeks [FSX’s] behaviour has been extremely difficult*”.

31. On 20 May 2009, Darryl Jones, Educational Psychologist, prepared a report of his findings based on the documentation, his attendance at the LAC Review on 18 May 2009 and the Annual Review of FSX’s SEN which had also taken place on that date. Mr Jones stated in his report:

“Interventions to help [FSX] develop his self-help and independence skills, his social skills and ability to interact with others, and regulate his emotional state do not appear currently to be entirely appropriate...My discussion with school staff at the review lead me to believe that [the School] will require guidance to implement appropriate strategies.”

Mr Jones made the following recommendations:

“[FSX] is likely to require specific research-based interventions suitable for children with ASD, delivered by someone with expertise of working to support children with high-functioning autism, with which his difficulties are consistent.

There should be involvement of a Specialist Teacher or other professional with expertise of working to support children with high-functioning autism and Asperger Syndrome.”

32. The trial bundle included Mr Jones’ report in draft form as well as the finalised version. The School’s position was that it did not receive the report until 17 September 2009, shortly before FSX was withdrawn by JLM.
33. On 1 June 2009, the Local Authority sent an email to JLM reiterating its plan that FSX should remain at the School for the next academic year. The email stated:

*“The Local Authority recognises that [FSX] has needs relating to his ASD that are not being met by the Mulberry Bush and that he will need to move to a more appropriate placement in this respect
It also has to consider though, his need for stability and the careful planning required to achieve this*

...The Local Authority would want time to identify appropriate provision and plan accordingly, and for this to take place at secondary school transfer age in 2010, to prevent the possibility of him needing to move schools again at this time

...

...A specialist teacher will be identified that can attend the school for half a day per week to spend time with [FSX] and to support the other staff in using strategies appropriate to ASD”

34. Towards the end of the summer term, FSX’s disruptive behaviour escalated. JLM was complaining to the School about various aspects of FSX’s management including the use of restraints and the use of a towel to hold FSX’s door open whilst confining him to his room (‘the towel method’). JLM’s email, dated 20 July 2009, to John Turberville – Chief Operating Officer at the School states as follows:

“The school claims to have a handle on [FSX’s] behaviour but it is clear from all the evidence before me that the school’s behavioural interventions are inappropriate and rely excessively on physical restraints.”

In a later email to Mr Turberville, dated 29 July 2009, JLM stated:

“I fully acknowledge the good work you and your staff does with children who are in crisis and I hope that you understand that my views relate specifically to the appropriateness of educational provision for my son as a child with an ASD.”

35. FSX returned to the School after the summer holidays, but only for a very short period.
36. On 14 September 2009, a meeting was held to discuss FSX’s placement. JLM and FSX’s maternal grandmother attended. JLM reiterated his dissatisfaction with the frequency of restraints. The notes of the meeting record that an Educational Psychologist - Vikki Lee would be attending the School to advise on behaviour strategies. FSX’s GP had confirmed that there was no apparent pain or injuries. The context for the towel method was explained and it was also stated that restraint was a last resort. The social worker acknowledged that some behavioural methods were not working and that she was “*not happy*” with the towel method being used. However, she stated:

“For [FSX] to move now would be detrimental for him as professionals we need to think about his secondary transfer in September this year. If [FSX] is removed from the school, it would not help his assessment”.

37. JLM withdrew FSX from the School in September 2009.

Evidence

Factual Witnesses

38. FSX did not give evidence during these proceedings. FSX’s instructing solicitor attempted to obtain a statement from him, but this proved to be too much of a challenge. Both psychiatric experts reported difficulties in discussing FSX’s time at the School. Dr Rippon, a Consultant

Developmental Psychiatrist instructed by FSX, stated in her report that: *“He found talking about the school very difficult and said that being at school was ‘torture.’”* Dr Oppenheim, a Consultant Child & Adolescent Psychiatrist instructed by the School, stated in her report:

“When I asked [FSX] to elaborate on his experiences, he told me he did not want to discuss what had happened, that he no longer experienced any symptoms of PTSD such as nightmares or flashbacks and that he had engaged with therapy in the past to help him make sense of his experiences, so that talking about them would only cause needless distress.”

39. In these circumstances, FSX relied solely upon the written and oral evidence of his father. JLM stated in his witness statement that during FSX’s first few weeks at the School, he was restrained on average, three to four times a week. However, this increased and by the time FSX left the School, he was being restrained up to 20 times per week. JLM stated:

“I believe that staff at the school abused [FSX] physically. I also feel that they mistreated him emotionally. They used painful and degrading restraint methods and forced him into seclusion. By his accounts to me, he could not understand why staff were treating him in that way. The very fact that [FSX’s] behaviour appeared to worsen considerably during his time at MBS confirms to me that the methods used by staff at the school had a very negative, long lasting effect on his emotional wellbeing.”

40. During his oral evidence, JLM stated that he was aware that the School used restraints, but he had no idea until he received the incident logs and reports (following a written request), the kind of restraints that were being used. Nor did he know how frequently it was happening. JLM described the incident at the airport where the police had been called. FSX refused to go back to the School and became quite distressed. The police escorted JLM and FSX to a car park where they were picked up. JLM stated that FSX was frightened of going back to the School.
41. In cross-examination, JLM confirmed that in the years before 2007, he was living in the family home on and off. However, at that time he was living in the local area and so would see FSX regularly. He accepted that the fact that he was no longer living in the family home would have had some impact on FSX. He denied that he took to *“took to disappearing”* for weeks or months but acknowledged that he might have left the home (following a row) *“for more than a day or more than two days.”* Various incidents were put to JLM where FSX was violent towards others prior to his placement at the School. These included a report that FSX stated that he would have killed another child (who was banging a door) if he had got hold of a hammer; bullying a new boy in the class and wishing him dead, when the boy hit back FSX picked up a barrel to hurt the boy stating *“I’ve had enough”* in an adult voice; one of FSX’s friends was taken to hospital after falling down the stairs and it was thought that FSX had pushed him. JLM stated that he may have *“missed”* some of these particular incidents. However, he was aware of the incident where FSX *“grabbed”* the shirt of his home tutor because he (JLM) was present at the time. JLM confirmed that he wanted FSX to go to an autism-specific school. He stated that he had to mention prospective schools to FSX because they would be coming to see him. He acknowledged that this may have led to an *“element of uncertainty.”* In re-examination, he stated that he was not trying to undermine FSX’s placement at the School.

42. Mr Agudelo - Senior Family and Networks Practitioner, and Ms Carolyn Sweet - Senior Therapeutic Childcare Practitioner, provided witness statements but were not called to give evidence. The alleged face-down restraints (a key aspect of this claim) were applied by Ms Chrissy Pusey. No evidence was adduced from her. On Day 4 of the trial, Ms Foster stated that Mr Agudelo was ill and therefore she would be relying on his evidence as hearsay. Subsequently, Mr Agudelo's wife had also become unwell and at the resumed hearing on 22 June 2023 (Day 5), Ms Foster confirmed that he had gone to Columbia to look after her. Ms Foster informed the Court that she would not be calling Mr Agudelo and would not be seeking to rely on his evidence as hearsay. She invited the Court to disregard his witness statement. On Day 8 of the hearing (1 February 2024) Ms Foster indicated that her instructing solicitors had not managed to make contact with Mr Agudelo, and she made reference to his mental health.
43. The School relied upon the evidence of the following witnesses:
- i. John Diamond, Chief Executive Officer at the School, – witness statement dated 7 September 2021.
 - ii. John Turberville, Chief Operating Officer at the School - witness statement dated 22 September 2021.
 - iii. David Roberts, Head of Outreach at the School, - witness statement dated 20 September 2021.
 - iv. Andrew Lole, School Improvement Leader at the School, – witness statement dated 8 September 2021.
 - v. William Long, Former Therapeutic Care Worker at the School, – witness statement dated 14 September 2021.
 - vi. Dr Caryn Onions, Consultant Child and Adolescent Psychotherapist at the School, – witness statement dated 17 June 2022.
 - vii. Angus Burnett, Head of the Family Team at the School, – witness statement dated 29 September 2021.
 - viii. Carol Day, Former Head of Group Living at the School, - witness statement dated 30 September 2021.
44. The evidence of John Diamond, John Turberville and David Roberts was not challenged.
45. Mr Diamond joined the School in 1991. He was appointed as the Chief Executive Officer in 2006. He described the referral process and stated that children who are admitted to the School have experienced significant disruptions and severe emotional trauma in their early years. He stated that the boundaries between behavioural difficulties due to attachment disorders and autism can be blurred. The School does not just work with the diagnosis; the aim is to work with the whole child and their families. Mr Diamond had little direct involvement with FSX but was aware from communication with staff members that he was a “*high profile*” child in that he was very impulsive and demonstrated very high levels of aggression.

46. Mr Turberville has had multiple roles within the School since 1993. From 2006-2017 he was the Director. He met FSX after the decision had been made to place him at the School. He explained the ethos of the School and that, following his appointment as Director, he decided to set up the Therapies and Networks Team to work more intensively with families. The team engages with family members, develops relationships, and helps them support the child's placement. He stated that some children do not have a diagnosis when they start at the School, but some do. The School does not get too involved with the initial diagnoses as in the past this has led to blind spots in seeing other issues for the child and their family. He explained that often the issues are a mixture of trauma, social, emotional, cognitive, and environmental factors and that the work of the School is to assess the best way to help the child and the family make progress.
47. David Roberts was the Head of Training at the School in 2006. In that role and his current role as Head of Outreach, he is required to ensure that staff receive mandatory training. He stated that all staff were trained in the use of physical interventions through a training programme called PROACT-SCIPr-UK ('PROACT'). The programme used four types of restraints: one-person escort; two-person escort; a wrap (one member of staff standing behind a child holding (wrapping) the child's arm across one another to ensure they are safe) and a supine (two or three person restraint whereby the child is laid on the ground, on their back, with physical support from staff to the child's shoulders and arms). The School moved to Team Teach behaviour support training in or around 2010/2011.
48. The other factual witnesses gave evidence and were cross-examined on behalf of FSX. The nature and content of their evidence is outlined below.
49. Andrew Lole was the Headteacher of the School from 1994-2016. He referred to a period when JLM "*came back in [FSX's] life once he had been placed at the school*". He stated that this "*turned [FSX's] life upside down and his behaviour became worse.*" FSX became very confused and disturbed. Mr Lole did not recall having any direct involvement with FSX in terms of physical restraints. However, on occasion, he had to get involved if staff members needed assistance. During cross-examination, Mr Lole's attention was drawn to an email from JLM, dated 10 July 2009, in which he asked (amongst other things) about an incident that took place on 6 July 2009 in which FSX was restrained. Mr Lole was believed to be one of the two staff members who had restrained FSX. Mr Lole could not recall receiving the email and could not recall the incident. He was "*confident*" that the bruises on FSX's arm would have been investigated. When asked to identify the strategies implemented by the School following the recommendation of Mr Jones, Mr Lole stated that those recommendations had to be understood within the context of a broader assessment and would be a matter for the School's professional judgment. Mr Lole was unable to provide a date or "*state roughly*" when JLM came back into FSX's life. In re-examination, Mr Lole informed the Court that the first year of a placement is a critical period of change for many children. FSX would have been told that he would be at the School for 3 years so cutting the placement short would probably leave him "*feeling terribly anxious and fearful of things going back to how they were*".
50. Mr Long explained, in his witness statement, that an external trainer provided him with physical management training during his induction. He was trained by an external PROACT trainer, but the School later switched to Team Teach which included a technique that

involved the child lying face down (which was deemed more effective). Mr Long stated that FSX did “*a lot better*” during the first half of his placement. Mr Long stated that he generally had “*a good relationship with [FSX], but...often had to physically restrain him to prevent him from harming himself or others.*” He was once bitten “*quite badly*” by FSX. On one occasion Mr Long witnessed FSX stab a gap year volunteer in the face with a metal fork. This incident occurred with no apparent provocation and at a time when FSX appeared calm. FSX became more unsettled when the relationship between JLM and the Local Authority started to deteriorate. Mr Long took the view that JLM started to project his strong feelings towards the Local Authority onto the School. During the last 3-4 months that FSX was at the School, he was completely disengaged from the staff and would often lash out physically. JLM seemed intent on proving to the Local Authority that they had placed his child in the wrong school. Mr Long stated that in his view a significant part of FSX’s distress was attributable to feeling conflicted about whether to trust the School. He believed that FSX’s parents had indicated to him that his placement was inappropriate. During cross-examination, he was asked about face-down restraints and taken to specific examples within the records. He stated that within a residential setting, there may be a “*small moment*” of dynamic risk assessment and then an attempt to institute a safe restraint technique as quickly as possible. He stated that he had a general memory of the struggles that Ms Pusey had in managing FSX physically. He suggested that taking FSX to the ground was the most effective one-person restraint technique that she could apply. It was something that happened occasionally within a much broader context of her job. He stated that he did not think that after a long restraint requiring a degree of physical exertion a mark or bruise is indicative of the restraint being unsafe. Mr Long stated that he recalled the general sense that calls home were difficult for FSX and left him with a feeling of anxiety.

51. Dr Onions, at the relevant time, was a clinical lead in the psychotherapy unit with clinical oversight of the children. She stated that the School has a multi-disciplinary team and adopts a therapeutic approach. It would take into account the emotional, social and educational development of a child to avoid blind spots. She also stated that part of her role was to help staff understand the child’s feelings. In response to questions in cross-examination, she stated that ITP is a multi-disciplinary document and a way to bring together the integrated approach of the School. The ITP was only printed out once every 6 months for the child’s review. The School employed an Educational Psychologist and much of the occupational therapy was done in the classroom and integrated into FSX’s daily routine.
52. Angus Burnett stated in his witness statement that 80% of referrals to the School would include a mention of ASD either due to a diagnosis or “*what a parent or others think.*” He stated that he makes it clear in referrals that the School is not a specialist placement for children with ASD; it is a placement for emotional and behavioural difficulties. Children may have autistic features but at a high-functioning level. During his oral evidence, he stated that many of the staff were experienced in working with children with ASD.
53. Ms Day became the Head of Group Living before FSX was admitted to the School. She stated, in her witness statement, that it was usual for a child’s behaviour to escalate when they first arrive at the School but then gradually settle. However, that did not happen with FSX. Ms Day believed that there was some correlation between FSX’s behaviour and “*his father coming back into his life.*” Ms Day stated that at the School children were not to be locked anywhere including their rooms. She stated that children were not secluded but a child

would be separated for the most serious behaviour such as setting off a fire alarm. The towel method was only to be used as a stopgap in highly charged and violent situations. No concerns were raised by Ofsted or the Oxfordshire Safeguarding Team about the use of this method and it was only deployed when it was reasonably necessary to enable the carers to protect themselves. The towel method reduced the risk of injury to staff members and the door was never closed; there was always a gap to allow the carer to maintain contact with FSX at all times. As soon as FSX stopped attacking the door would be opened. According to Ms Day, FSX was never trying to leave the room; he was trying to attack staff. In light of JLM's continuing complaints, Carol Day sent an email on 1 July 2009 reminding her team of the guidance with regard to the use of the towel method. The email stated the towel method should only be used in the following circumstances:

*“1. If you are on your own or if there are more of you but you do not feel it is safe to go into the room to restrain. This may be if the child is throwing hard objects, so therefore to **protect yourself**.*

*2. If the child has been restrained for a long time and you feel it is not healthy for him or her to continue and you want to try giving the child some space by backing away. If the child is attempting to attack, then holding the door **briefly** may break this dynamic.” [emphasis in the original]*

Expert Witnesses

Breach of Duty

54. On the breach of duty issues FSX relied on the report, dated 5 April 2022, from Ms Sylvia McKenzie who is an experienced social worker in child protection. The School relied on the report, dated 30 June 2022, from Mr Matthew Vince who is a Care and Education Management Expert. Ms McKenzie and Mr Vince met to discuss areas of agreement and disagreement. They subsequently produced a joint report dated 8 December 2022.
55. FSX's psychiatric expert - Dr Lisa Maria Rippon had also made observations on some of the breach of duty issues in her reports dated 12 October 2013, 3 May 2018 and May 2022 but had not been asked to participate in the joint discussion with Ms McKenzie and Mr Vince. After Ms McKenzie's evidence on Day 6 of the trial (23 June 2023), FSX made an application for permission to call Dr Rippon to give evidence on the breach of duty issues. Ms Foster objected, on behalf of the School, on the basis that the Directions Order of Master Brown dated 25 June 2021 had not been interpreted by the parties with this objective in mind. FSX's application was allowed. My interim judgment was circulated to the parties in draft form on 9 August 2023. The final version is appended to this judgement (see Appendix 1).
56. The matters agreed by Ms McKenzie and Mr Vince may be summarised as follows:
 - i. No assessment or formal diagnosis of ASD had been made at the time of FSX's admission to the School. The formal diagnosis of ASD was not made until 7 May

2009 by Dr Chapman. FSX was diagnosed with High Functioning ASD, Behaviour Difficulties and possible Emotional Disorder.

- ii. FSX's placement at the School was appropriate initially "*in order to address challenging behaviours and complex needs and educational needs*".
 - iii. FSX's behaviour escalated in September 2008 following a summer holiday spent with JLM followed by a period of improvement before a further significant escalation in June 2009.
 - iv. The use of PROACT was appropriate and staff should also have had some therapeutic training.
 - v. It was reasonable and appropriate for the School to seek external help in managing FSX. The School assessment in October 2008 requested a formal assessment of FSX and the referral to CAMHS in December 2008 was reasonable. The only reservation is that there was considerable delay between the referral to Dr Chapman and his assessment, but this was not in the control of the School.
 - vi. There were clear indications that FSX was displaying extreme behaviours many years before his placement at the School.
 - vii. Background factors contributing to FSX's behaviour included parental discord, inconsistent parenting styles, possible limited sexual boundaries, apparent lack of consequences for his actions, the birth of his sister, and no formal diagnosis of ASD.
 - viii. As FSX grew bigger and became stronger over a short period of time, this would have presented more challenges to his carers.
57. The areas of disagreement between Ms McKenzie and Mr Vince following their joint discussion may be summarised as follows:
- i. Knowledge of ASD: Ms McKenzie stated that the School should have had more knowledge of the emerging understanding of ASD, in particular through the Foundation Degree in Therapeutic Work established by the School's Head of Training - Mr David Roberts. There is evidence that the school had a member of the teaching staff who had approximately 9 years' experience of working with children with ASD. Mr Vince disagreed. During 2008-2009 the "*understanding of ASD was limited within residential practice and education settings*". He noted that the Foundation Degree course referred to by Ms McKenzie was only created in 2008. He also relied upon the Ofsted report dated October 2008 which states that "*staff training is outstanding.*"
 - ii. Use of Restraints in Principle: Ms McKenzie acknowledged that she "*is not an expert in residential care*" but took issue with the use of the supine method which she states should never be used. It was her view that "*...although most aspects of this approach [PROACT] were reasonable to use with [FSX], certain aspects were unacceptable for use on a slight 10-year-old. For example, the 'supine' which was designed for use on aggressive adults in mental health settings. Furthermore, the use of a 'Face Down*

Supine (i.e. *Prone*) should never be used on a child. Some experts consider this type of restraint as dangerous when used on petite or slight children.” Mr Vince stated that *"Supine was a recognised restraint technique within the training programme delivered to children’s residential care settings and schools. It continues to be a recognised restraint technique in programmes delivered in these settings"*.

- iii. External Advice During FSX’s Placement: Ms McKenzie believed that further advice should have been sought either from the Local Authority or from the local CAMHS. She considered that once the ASD diagnosis was received on 7 May 2009, the School should have sought specialist interventions as recommended by Dr Chapman. Mr Vince disagreed and referred to *"a significant number of meetings"* between the School, the Local Authority and other agencies. Dr Chapman stated that behavioural interventions through the school environment were most likely to produce an improvement in FSX’s behaviours and it was unlikely that he would respond to any direct therapeutic intervention from specialist CAMHS at present. In any event, the School had lined up support from a teacher with specialist ASD experience.
- iv. FSX’s Case in Focus: The experts were asked to identify any particular incidents of restraint which were not appropriate and/or not reasonable and to state in respect of each and every incident the relevant date, the basis for such opinion, whether such an approach would have been considered to be appropriate and reasonable by a responsible body of appropriately qualified and skilled professionals working in the same context and what steps should have been taken as an alternative, together with the alleged outcome thereof. Ms McKenzie cited 4 incidents. These incidents took place on 27 July 2008, 16 June 2009, 29 June 2009 and 15 September 2009. She stated that many proactive and positive interventions can assist without the use of restraint and that had external support been sought, alternatives would have been suggested. Mr Vince did not accept that any of the recorded incidents were inappropriate and/or not reasonable. He pointed out that each physical restraint is unique and requires staff to act decisively and effectively in the moment, often in a matter of a few seconds to assess the presenting risk, to communicate to all involved and act to steer the situation to a *"good enough"* outcome. He also states that his *"opinion is further supported by the findings of the Police and Placing Authority Investigation that found no wrong-doing by [the School], the findings of the Tribunal Panel that found no wrong-doing by [the School], and the judgement of ‘Outstanding’ given by Ofsted to [the School]. These could reasonably all be considered as “a responsible body of appropriately qualified and skilled professionals working in the same context”*.
- v. False Imprisonment: the experts agreed that whether the School’s towel method amounted to a *"deprivation of liberty"* (it was agreed by Ms Walker that this term has a specific meaning and therefore references to deprivation of liberty in the Particulars of Claim should be read as a reference to false imprisonment) is a legal matter outside of their expertise. Mr Vince pointed out that the towel method was used to keep FSX’s bedroom door ajar to allow staff to continue to communicate with him without being at risk of attack. He relied upon his own experience of having used a similar methodology in his own practice. He also relied upon a guidance document from 2019 which supports this approach. Ms McKenzie stated that the 2019 guidance post-

dates the events in question and in response to the question “*what other technique D should have utilised*”, she stated that she “*is not an expert in residential care*”. It was Ms McKenzie’s view that the towel was used to hold the door closed and any means to prevent FSX from leaving his room amounted to a ‘*deprivation of liberty*’. It was Ms McKenzie’s understanding that FSX was not under direct supervision as staff were not in his room but remained outside.

Medical Evidence

58. Both parties relied upon reports from Consultant Psychiatrists to address the issues of condition/prognosis and causation. Dr Rippon, on behalf of FSX, provided a report dated 15 December 2017. Dr Audrey Oppenheim, on behalf of the School, provided a report dated 29 June 2022. They produced a joint report, dated 13 December 2022, which may be summarised as follows:
- i. FSX was presenting with features of ASD, although he had not been formally diagnosed with this condition at the time of his admission to the School in June 2008. A formal diagnosis was not made until 7 May 2009.
 - ii. Both accept that the issue of FSX’s special educational needs at the time of his admission is not within their area of expertise.
 - iii. At the time of admission to the School, FSX was presenting with a Mild Learning Disability, ASD traits, emotional/behaviour difficulties and attachment difficulties.
 - iv. The current diagnoses are ASD and Mild Learning Disability.
 - v. FSX’s challenging behaviour was multi-factorial in its aetiology.
 - vi. Prior to his admission FSX was presenting with challenging behaviour within the school, community and home environments, where his mother was struggling to manage his presentation:

“...there were inconsistencies across all environments and that others were struggling to manage [FSX’s] behaviour; hence the reason why he was admitted into a residential school”.
 - vii. “[FSX’s] behaviour became more challenging during the period when he attended MBS, but again this is within the area of an Educational Psychologist”
 - viii. Both accept that Dr Chapman did not make any particular recommendations.
 - ix. If FSX was struggling at the School further support could have been sought from external agencies: “*an educational psychologist would be able to provide additional comments on this area*”.
 - x. The placement at the School was appropriate for FSX based on his needs as understood at the time of his initial placement:

“[FSX] did not have a formal diagnosis of autism spectrum disorder at the time he was admitted to [the School]. It would not have been necessary for the Local Authority to consider seeking a residential educational placement specifically adapted to the needs of young people with autism spectrum disorder. It was only after the diagnosis of ASD was confirmed by Dr Chapman that a more specialist placement could have been identified”.

- xi. Under the heading “Causation of any Injury” it was agreed that FSX would have become distressed because of the restraint which was being used and would also have had a limited understanding about being away from home: *“...but it did not give rise to additional psychiatric difficulties sufficient to meet any formal psychiatric diagnosis”.*
- xii. FSX’s placement at the School broke down because his father, who had parental responsibility, withdrew section 20 consent.
- xiii. The strategies used at the School were not effective in improving FSX’s presentation and:

“Although difficulties in finding suitable placements for [FSX] after September [2009] lead to increasingly frequent breakdowns in such residential educational placement, it was not inevitable that [FSX] would require treatment in a psychiatric setting. The breakdown of these placements increased the risk of [FSX] requiring psychiatric treatment. However, whatever the outcome of [FSX’s] time at MBS, it is likely that he would have required specialist psychiatric treatment in adolescence”.

- xiv. As a consequence of his learning disability and Autism, FSX will always need a high level of support.

Key Legal Principles

Negligence

59. The tort of negligence requires conduct or a failure to act that breaches a duty of care. The relevant standard is the degree of care, competence and skill to be expected from a person engaging in the activity or function undertaken by the School. The test for establishing a breach of duty is the well-known case of *Bolam v Frien Hospital Management Committee* [1957] 1 WLR 582. In *Bolam*, McNair J stated as follows:

“The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.

... he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. ... Putting it the other way round, a man is not negligent, if he is acting in

accordance with such a practice, merely because there is a body of opinion who would take a contrary view.”

60. The *Bolam* test is subject to the refinement applied by Lord Brown-Wilkinson in *Bolitho Appellant v City and Hackney Health Authority Respondents*. The learned judge stated:

“...the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter”

Battery

61. It has long been established as a fundamental principle *“that any touching of another person, however slight, may amount to a battery.”* (see *Collins v Wilcock* [1984] 1 W.L.R. 1172, 1177 per Goff LJ. In *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] A.C. 871 Goff LJ stated:

“So widely drawn a principle must inevitably be subject to exceptions. For example, children may be subjected to reasonable punishment; people may be subject to the lawful exercise of powers of arrest; and reasonable force may be used in self-defence or for the prevention of crime. But, apart from these special instances where the control or constraint is lawful, a broader exception has been created to allow for the exigencies of everyday life. Generally speaking, consent is a defence to battery; and most of the physical contacts of ordinary life are not actionable because they are impliedly consented to by all who move in society and so expose themselves to the risk of bodily contact... In each case, the test must be whether the physical contact so persisted in has in the circumstances gone beyond generally acceptable standards of conduct; and the answer to that question will depend upon the facts of the particular case.”

62. In *Wilson v Pringle* [1987] QB 237 at 249 G-H per Croom-Johnson LJ (having considered Denning MR’s judgment in *Letang v Cooper*) [1965] 1 Q.B. 232 stated:

“an intention to injure is not essential to action for trespass to the person. It is the mere trespass by itself which is the offence.”

63. Section 93 of the Education and Inspections Act 2006 (in force from 1 April 2007) provides as follows:

*“(1) A person to whom this section applies may use such force as is **reasonable** in the circumstances for the purpose of preventing a pupil from doing (or continuing to do) any of the following, namely–*

- (a) committing any offence,
- (b) causing **personal injury** to, or **damage to the property** of, any person (including the pupil himself), or
- (c) **prejudicing the maintenance of good order and discipline at the school or among any pupils receiving education at the school, whether during a teaching session or otherwise.** [emphasis added]”

False Imprisonment

64. False imprisonment is a tort of strict liability. It is established on proof of the fact of imprisonment and the absence of lawful authority to justify that imprisonment. In *R (Jolloh) v Home Secretary* [2021] AC 262, Baroness Hale set out the relevant principles establishing a claim in false imprisonment (§24):

“As it is put in Street on Torts, 15th ed (2018), by Christian Witting, p 259 “False imprisonment involves an act of the defendant which directly and intentionally (or possibly negligently) causes the confinement of FSX within an area delimited by the defendant.” The essence of the imprisonment is being made to stay in a particular place by another person. The methods which might be used to keep a person there are many and various. They could be physical barriers, such as locks and bars. They could be physical people, such as guards who would physically prevent the person leaving if he tried to do so. They could also be threats, whether or force or legal process.”

65. The question of whether there is lawful justification for imprisonment has to be determined at the time of the imprisonment. It is irrelevant whether or not the defendant honestly and reasonably believed that he had the necessary authority to detain FSX if, in fact, no such authority existed (see - *R v Governor of Brockhill Prison, ex p Evans* (No 2) [2001] 2 AC - 32F and 35A-F).

Guidance and Policy Documents

Guidance

66. The Guidance on the Use of Restrictive Physical Interventions for Staff Working with Children and Adults who Display Extreme Behaviour in Association with Learning Disability and/or Autistic Spectrum Disorders was issued by the Department For Education (DfE) in July 2002 (‘the 2002 Guidance’). Paragraph 3.1 of the 2002 Guidance provides a table explaining the difference between non-restrictive and restrictive interventions, categorized according to “*Bodily Contact*” (e.g. manual guidance or holding a person's hands to prevent then hitting someone) “*Mechanical*” (e.g. use of a protective helmet or use of arm cuffs or splints) and “*Environmental Change*” (e.g. removal of the cause of distress or forcible seclusion or use of locked doors). The 2002 Guidance explains that:

“The use of force is associated with increased risks regarding the safety of service users and staff and inevitably affects personal freedom and choice. For these reasons

this guidance is specifically concerned with the use of restrictive physical interventions.”

67. Paragraph 3.3 of the 2002 Guidance sets out the difference between planned and unplanned interventions. Planned interventions involve staff, where necessary, using pre-arranged strategies and methods which are based upon risk assessments and recorded in care plans. Whilst unplanned interventions occur “*in response to unforeseen events*”. Any planned interventions should be: (i) agreed in advance by working in consultation with the child’s carers and those with parental responsibility; (ii) described in writing and incorporated into other documentation which sets out a broader strategy; (iii) implemented under the supervision of an identified member of staff who has undertaken appropriate training; and (iv) recorded in writing so that the method of physical intervention and the circumstances can be monitored and, if necessary, investigated (Para 3.8 of the 2002 Guidance).

68. Paragraph 3.4 of the 2002 Guidance states that:

“The scale and nature of any physical intervention must be proportionate to both the behaviour of the individual to be controlled, and the nature of the harm they might cause. These judgements have to be made at the time, taking due account of all the circumstances, including any known history of other events involving the individual to be controlled. The minimum necessary force should be used, and the techniques deployed should be those with which the staff involved are familiar and able to use safely and are described in the child or service user’s support plan. Where possible, there should be careful planning of responses to individual children and adults known to be at risk of self-harm, or of harming others.”

69. There are similar provisions within the Guidance on the Use of Restrictive Physical Interventions for Pupils with Severe Behavioural Difficulties was issued by the DfE in September 2003 (‘the 2003 Guidance’).

Policy

70. The School’s behaviour policy “*Handling Difficult Behaviour and the Use of Sanctions*” (‘the Policy’) states as follows:

“[s]anctions are routinely used by staff teams to promote appropriate behaviour, and to help individual children accept responsibility for their actions. Staff teams should regularly review the use of sanctions for individual children to ensure that they are helping them to learn and become more responsible. If a sanction is not appropriate or effective it should not be used.”

71. The list of sanctions include:

“internal exclusion” – “This means being supervised 1 to 1 in a place away from the other children following a very serious incident e.g. setting the fire alarm off, absconding, or serious physical assault.”

72. The Policy states that physical restraints should only be used if the staff member has been trained in PROACT and if a child is in danger of hurting themselves or another person, causing non-trivial damage to property or serious disruption to other children. The Policy also states that physical interventions should only be used in circumstances where other forms of intervention have been tried and preventative steps have proved to be unsuccessful. The Policy states:

“A.III...Don’t use restraint as such a regular feature of practice that it comes to be seen by children as such an everyday method of control and one which they will come to demand/expect before accepting adult authority.”

73. The policy also sets out that the School has no approval under the Children Secure Accommodation Regulations 1991 and therefore “[t]he locking of a child or children in a single room at any time, even when accompanied by a responsible adult or adults” is not permitted.

74. Other parts of the Policy state:

“Guidance on the use of physical restraint:

- *Only use a physical restraint if you have been trained in the use of [PROACT].*
- *Only use a physical restraint if a child is in danger of hurting her/himself, yourself or another person, causing non-trivial damage to property, or seriously disrupting another children.*
- *Only use a physical restraint if other forms of intervention have been tried and preventative steps are unsuccessful. These may include talking, comforting, calming, withdrawing yourself from the situation. **It is not permitted to restrain children face down.**”[emphasis added]*

Submissions

75. In accordance with my Order, dated 5 February 2024, Counsel provided written closing submissions in advance of the hearing on 7 March 2024. FSX was permitted to serve a Response to the School’s written submissions and the School was permitted to serve a Reply to FSX’s Response limited to addressing issues of law. The Court subsequently received a Response and a Reply from Ms Walker and Ms Foster respectively.

On behalf of FSX

76. Ms Walker sent an email to the Court on 4 March 2024. She invited the Court to disregard nine paragraphs of the Reply as they defeated the purpose of the Order which was to reflect the standard process of enabling FSX to effectively ‘have the last word’ save where issues of law have arisen to which a response is required. It was submitted that circumventing this process was inappropriate and should not be allowed to stand. Ms Walker made oral

submissions in respect of the same point on 7 March 2024 and sent the Court a follow-up email on 8 March 2024 as it was unclear (at that time) whether I had had sight of her original email. The follow-up email suggested that on further review only seven paragraphs of the Reply complied with my Order.

77. Ms Walker informed the Court that she had intended to ask Ms Sweet questions about an incident on 22 July 2008 during which FSX was restrained in a supine position by two members of staff. The record for this incident included FSX's comment on a scratch or graze on his arm that he felt had been caused by Ms Sweet. However, Ms Sweet was not produced as a witness. Ms Walker submitted that no evidence had been adduced from the individuals who physically restrained FSX, and no explanation was provided as to why neither written nor oral evidence was taken from them. She reminded the Court that Mr Agudelo had not been called to give evidence and no medical evidence had been provided to support the assertion that he was unwell. Ms Walker invited the Court to draw adverse inferences in respect of the absence of Ms Sweet, Mr Agudelo and Ms Pusey.
78. Ms Walker submitted that the evidence of Mr Vince should not be admitted or, in the alternative, should be afforded little weight because he either did not understand or did not comply with his obligations as an expert for two reasons. First, he failed to disclose that in 1997 when completing his postgraduate diploma he had undertaken a week's observation at the School. When asked, during cross-examination, why he had not disclosed this information he stated, "*I thought it was so long ago it was a different time.*" Secondly, his report did not contain a "*comprehensive, objective analysis*" and fell foul of the principle that: "*An expert must not solely pick out pieces of evidence or entries in documents which provide support for the conclusion he/she has reached whilst not addressing material that points, or may point, the other way.*" (*see – Cotter J in Muyepa v Ministry of Defence [2022] EWHC 2648 (KB) at §290*)
79. Ms Walker submitted that whether the use of force in a particular case is reasonable must be determined by what the school or institution permits. In this case, the Policy does not permit the restraint of a child face down. She further submitted that the Policy does not qualify the prohibition in any of the ways the witnesses tried to suggest would make a face-down restraint permissible, i.e. through dynamic risk assessment or emergency circumstances. In any event, there is no proper basis to suggest that it was an "emergency" or "dynamic" response, given that the very purpose of the approved restraints was to respond to known behaviours which could include self-injury or behaviours which injured or risked injuring others. She submitted that this is a complete answer to whether the claim in respect of the face-down restraints is made out. Ms Walker submitted that even if the Court does not accept the effect of the prohibition, it remains for the Court to determine whether the restraints were reasonable. She invited the Court to conclude that the face-down restraints were not reasonable because they were contrary to the Policy, Ms. Pusey had no training in applying them and they are inherently dangerous forms of restraint.
80. Ms Walker submitted that the towel method was a form of seclusion and would have been inappropriate regardless of the time period. The seclusion amounted to unlawful imprisonment. She further submitted, that even if the towel method is not prohibited, it was still false imprisonment because there was no other lawful basis for it.

81. Ms Walker contended that the School negligently failed to meet FSX's needs. First, the School failed to put in place strategies which would have resulted in a reduction in FSX's challenging behaviour. Secondly, the School failed to seek support appropriate from external agencies.

On behalf of the School

82. Ms Foster did not accept that she had failed to comply with the terms of my Order. Nor did she accept that any adverse inferences should be drawn. She conceded that Mr Vince found the experience of giving difficult and noted that he was accused of being deficient in his analysis. However, she submitted that this was not a fair criticism in that most of his report is not contentious.
83. Ms Foster submitted that there was no basis upon which the Court can impute the necessary intent to find that FSX was assaulted by particular members of staff. She also submitted that there was no basis upon which the Court could impute the necessary intent to substantiate the allegation of false imprisonment. Ms Foster submitted that the towel was not used either (i) to close the door completely; or (ii) to secure FSX in his room. FSX benefited from this method as it enabled him to calm down and avoid more restraint and potential injury to himself and others.
84. In respect of the negligence claim Ms Foster submitted that FSX's case rests primarily on the incomplete analysis of historic records and by selectively focusing on entries without taking the whole picture into account. She submitted that this a dangerous exercise, rendered more obscure by the unhelpful contributions of Ms McKenzie and Dr Rippon, neither of whom possesses the requisite expertise to assist the Court on the issues requiring expert input. Ms Foster made a similar submission in respect of the physical restraints. Ms Foster invited the Court to conclude that in the context of FSX's frequent challenging behaviour, the restraints were all legitimate, proportionate and well documented. Ms Foster submitted that the escalation in FSX's behaviour was clearly associated with the instability and uncertainty caused by JLM. She further submitted that FSX was restrained as a last resort in the context of a well-managed and understood methodology for achieving de-escalation and restraint was only used when necessary to protect FSX and/or staff, to prevent damage to property or to maintain order in the classroom. FSX was physically restrained where necessary in dynamic situations where staff were expected to risk assess and exercise judgment in fast-moving situations. The methodology used was in accordance with the PROACT training, but if that did not prove effective, staff were entitled to take reasonable, proportionate steps to defend themselves.
85. Ms Foster submitted that the School was not under any duty to engage external support for FSX. His treatment was arranged through the Local Authority network.

Issues

86. There was no material dispute between the parties as to the central issues in dispute. These issues are as follows:
- i. Was FSX subjected to assault and/or battery during his placement at the school, in particular on 16 June 2009, 29 June 2009, and 15 September 2009?
 - ii. Was FSX subjected to false imprisonment during his placement at the school on 14 December 2008 and 15 September 2009?
 - iii. Was the School negligent in its management and care of FSX?
 - iv. What (if any) loss and damage flows from the alleged tortious conduct?

Analysis and Factual Findings

Overview

87. The parties produced opening and closing written submissions including inconsistencies which were submitted by each side to have the effect of weakening the evidence of the witnesses called by the other. Whilst paying tribute to the well-intentioned and articulate submissions I have resisted the temptation to try to reconcile and resolve all of the issues which have been generated. Therefore, in my analysis of the evidence I will not address every point that was raised; only such matters as have enabled me to conclude whether the claim (or part of the claim) should succeed.
88. In a nutshell, the basis of the claim in negligence was that the School failed to implement a strategy to manage FSX's behaviour taking into account his ASD, failed to implement alternative solutions to manage his behaviour and failed to adequately engage external support. It was also alleged that the School used excessive and disproportionate physical restraint. The allegation that FSX was exposed to the sexualised behaviour of other pupils was not withdrawn but faded in significance during the trial and was not mentioned by Ms Walker in her closing submissions.
89. The pleaded claim relies upon a non-exhaustive list of alleged excessive and disproportionate physical restraints. However, during the trial, it became apparent that the complaints of inappropriate restraint were focused on the four incidents relied upon by Ms McKenzie in the joint expert report dated 8 December 2022. Although Mr Vince was of the view all instances of the use of physical restraint were appropriate and/or reasonable, Ms McKenzie identified four occasions where in her opinion the use of physical restraint was excessive, and therefore, inappropriate and unreasonable. The specific examples of restraint relied upon by Ms McKenzie are as follows:
- i. 22 July 2008: Supine – *"the use of a Supine appears excessive, given that FSX had already responded to Touch Support and a Two Person Wrap during the same incident"*.
 - ii. 16 June 2009: use of a Face Down Supine (Prone): *"This is never an appropriate method of restraint for a child of 10 years old"*.

- iii. 29 June 2009: Face Down Wrap. *"This is an inappropriate method for use with a child"*.
 - iv. 15 September 2009 – application of a Face Down Supine (Prone) *"as above"*.
90. The specific examples of restraint Dr Rippon relied upon as being inappropriate are set out in her final report dated 3 May 2018. She stated:
- “On reviewing the records of restraint, I believe that, using these guidelines, the vast majority, with only a handful of exceptions (including 4 July 2008, 6 July 2008 14 July 2008), would meet the DOE criteria for use of restraint - in that the restraints do appear to have been in response to aggression and were undertaken in order to manage the risk that DD was posing to either himself or more frequently to other people. In general, the type of restraint used seems to be proportionate to the episode described in the incident notes, with the exception of the use of face down supine restraints...”* [emphasis added]
91. There is some overlap between Ms McKenzie and Ms Rippon in their identification of allegedly inappropriate incidents, namely the face-down restraints, but their opinions are not in complete alignment.
92. The incidents on 16 June 2009, 29 June 2009 and 15 September 2009, which allegedly involved face-down restraints, are also cited as incidents of assault and/or battery.
93. I accepted the submission made by Ms Foster that none of the breach of duty experts were competent to assist the Court in resolving the negligence allegation in its totality; the answer must lie in the Court undertaking a careful examination of the documentation. Furthermore, the expert evidence was not required to resolve the other allegations. It is a matter of fact and legal submission whether: (i) the physical restraints amounted to assault/battery; (ii) the towel method amounted to false imprisonment; (iii) the School failed to engage with external agencies; and (iv) the School exposed FSX to the sexualised behaviour of other children. Nonetheless, where appropriate, I have referred to the expert opinion evidence to explain my reasoning.
94. Before I turn to each cause of action to determine whether liability has been established, I will briefly address the following matters:
- i. Should certain paragraphs of Ms Foster’s Reply be disregarded?
 - ii. Should Mr Vince’s expert evidence be disregarded or afforded little weight due to an undeclared conflict of interest?
 - iii. Should any adverse inferences be drawn?

Ms Foster’s Reply

95. As stated above, Ms Walker took issue with a number of paragraphs within Ms Foster's Reply and invited me to disregard them on the basis that they did not relate to matters of law. I rejected that submission.
96. Having reviewed the document I noted that there are a few paragraphs which are arguably further submissions in respect of the factual evidence. However, on the whole, the Reply is a submission on matters of law. In any event, I was satisfied that no injustice had been caused. Both parties had ample opportunity in oral and written closing submissions to argue the factual and legal issues in this case. Many of these issues were emphasised several times throughout the hearing. FSX was not disadvantaged by my willingness to take the entirety of the Reply into account.

Undeclared Potential Conflict of Interest

97. Ms Walker attacked Mr Vince's professionalism as an expert witness. As stated in paragraph 78 above this arose because Mr Vince did not declare that he had undertaken a placement at the School in 1997. At that time four of the School's witnesses were employed there.
98. It would come as no surprise to a court if professionals working within the same field know each other, or know of each other, especially if they have been in practice for many years. The fact that Mr Vince spent a week on placement at the School 27 years ago did not necessarily mean that he could not give expert evidence in this case and Ms Walker did not suggest otherwise. There was also no suggestion that he was so close to the School that his independence was compromised. But in my view, Mr Vince's connection to the School was a potential conflict of interest. He should have disclosed this connection at the earliest opportunity which is likely to have been when he was initially instructed. At the very latest he should have included a concise paragraph in his expert report setting out his link to the School and the context. That would have sufficed. By choosing not to do so, he opened himself up to justified criticism. Although Mr Vince stated that it had not occurred to him that his week of observation was relevant; that he fully understood his duty to the Court as an expert witness and that he did not consider that he was conflicted, the non-disclosure was in itself a significant failing.
99. Mr Vince's primary duty was to the Court and not his client. His omission did not cause me to reject his evidence in its entirety; not least because much of it was agreed during his discussion with Ms McKenzie. But it did give me reason to question whether Mr Vince was sufficiently familiar with his obligations as an expert witness. In these circumstances, his evidence was treated with caution. The extent to which I accepted or rejected his evidence is addressed below.

Adverse Inferences

100. In *Wiszniewski v Central Manchester Health Authority* [1998] PIQR P324 the Court of Appeal held that in the absence of a witness: (i) the court may draw an adverse inference; (ii) such an inference (if drawn) may strengthen the evidence adduced by the other party; (iii) but

there must be some evidence which raised a case to answer; and (iv) if an explanation for the absence was given, even if it was not wholly satisfactory, the potentially detrimental inference may be reduced or nullified. As the first principle makes clear, there is no obligation to draw an inference; the court has a discretion.

101. Contrary to the submission made by Ms Walker I was not satisfied that there was a proper basis upon which adverse inferences could be drawn in respect of the absence of Mr Agudelo, Ms Sweet, and Ms Pusey. Mr Agudelo's absence was explained. It was not a wholly satisfactory explanation, but I accepted that for various reasons it was decided that he would not be called as a witness. The absence of Ms Sweet and Ms Pusey was not explained (other than in very general terms) but I was not driven to the conclusion that it was reasonable to *expect* any of these witnesses to give evidence bearing in mind: (i) the relevant events date back to 2007/2008; (ii) the other relevant evidence that was available; (iii) the fact that FSX's placement at the School was well-documented; and (iv) and the significance of the points that could have been raised with these witnesses in the context of the case as a whole. There are inherent risks in calling or not calling a witness (including the risk of an adverse inference). But it was entirely appropriate for Ms Foster to make that judgment call based on her assessment of the case and I accepted her submission that no adverse inferences should be drawn.
102. Furthermore, at no stage did Ms Walker make it clear what specific inference she was inviting me to draw. I did not doubt that there were a number of possible inferences that could be drawn but, in my judgment, they were highly speculative and therefore inappropriate.

Battery

103. A brief summary of each of the face-down restraints as recorded in the handwritten records is set out below.

16 June 2009

104. The Incident Daily Log records that on 15 June 2009, at around 5.40pm FSX set off the fire alarm and was made subject to a 3-hour separation. At 3.30pm on 16 June 2009, FSX became agitated, and he was held in a 2-person supine. The later incident which occurred at 6pm is set out in full below:

*“[FSX] was separate for setting the fire alarm off. After tea, [FSX] started trying to leave his room and said he was going to set the fire alarm off again. [Ms Pusey] stopped [FSX] by holding his forearms, and reminded him, he could only have the door open, if he could be sensible in his room. [FSX] could not do this and started to hit and kick. [Ms Pusey] held [FSX] in a wrap, but this was not effective to protect herself. [Ms Pusey] held [FSX] **on the floor applying some weight to [FSX's] back.** [Ms Pusey] called for support so that she could leave [FSX's] room and hold his door shut until he could take control of himself. Dave Goodspeed assisted in helping*

[Ms Pusey] leave the room so that she could hold [FSX's] door shut. Holding the door shut felt safer than one adult restraining [FSX]. [Emphasis added]

29 June 2009

105. During the afternoon in the afternoon on 29 June 2009, FSX set off the alarm and became violent towards staff. He was held in a wrap and then a 2-person supine. The relevant incident subsequently occurred at 7.25pm. FSX was swearing and became unsettled. The entry goes on to state:

*“[Ms Pusey] then asked FSX to go to bed. [FSX] used racist language. When [Ms Pusey] told [FSX] that he would not be getting his ice lolly that night, because of his behaviour, he started trying to hit [Ms Pusey] in the face. [Ms Pusey] protected herself by holding [FSX] in a wrap, **face down on his bed**. [FSX] remained in this position for roughly 10 minutes before being able to talk about what could help him to settle.”* [emphasis added]

15 September 2009

106. There were various incidents on 15 September 2009 involving violent and disruptive behaviour by FSX. At 5.15pm FSX ran over to the swings whilst Ms Pusey was supporting him in completing an activity. Ms Pusey applied touch support and told FSX that he needed to complete the activity before tea. The record states:

*“[FSX] started attacking [Ms Pusey] and bit her arm, so [Ms Pusey] put [FSX] in a wrap and then **pushed him on to the ground face down** to protect herself whilst she called for support.”* [emphasis added]

Two members of staff then supported Ms Pusey to put FSX into a supine on the floor.

107. I accepted the submission made by Ms Walker that any physical restraint in which the legislative purpose was not met, where reasonable force in the circumstances was not used, and where no other defence has successfully been raised would constitute a battery.
108. Dr Rippon is qualified and competent to give expert evidence on the management of behavioural issues associated with ASD, including the use of physical restraint and seclusion. However, she does not have experience of managing residential children's homes. Nor has she been trained in the use of PROACT or restraint techniques more generally. She made a distinction in her report between residential settings and hospital settings. She stated during her oral evidence that face-down restraints are not appropriate in a residential setting under any circumstances. She explained that in hospital settings young people who have been restrained face-down will be subject to physical observation checks (e.g. monitoring blood pressure, pulse, oxygen saturation etc) for a period of time afterwards to ensure that they are not experiencing any adverse effects from the restraint. She stated that in a residential setting members of staff should not have to make *“life threatening interventions.”* On one level this appeared to be a perfectly reasonable opinion, but it was not possible to fully reconcile that

viewpoint with the evidence from Mr Long that Team Teach (which was implemented during 2010/2011) includes training on face-down restraints. The Policy also condoned the use of the supine restraint which Dr Rippon was also highly critical of even when not applied face down. I accepted the evidence of Mr Vince on this issue that, at the material time, supine was a recognised restraint technique within the training programme delivered to children's residential care settings and schools. I also accept that it continues to be a recognised restraint technique in programmes delivered in these settings. That said, all physical restraints involve some risk of injury to the person being restrained and to staff. However, there is less risk of injury when staff members are well-trained and safer techniques are used.

109. I accepted the submission made by Ms Walker that it was striking that none of the School's lay witnesses referred, in their witness statements, to the prohibition of face-down restraints as set out in the Policy. During cross-examination, when the Policy was put to Mr Long, he took issue with the words "*restraint*" and "*face down*". He accepted that the Policy prohibits face-down restraints and that there was no training in PROACT on how to safely hold a child face down. However, he stated that when interacting with a child who is behaving very dangerously it may not be possible to immediately apply "*a safe restraint technique*". He went on to state that he would not necessarily describe what happened as a restraint. In his view, a restraint would be the ultimate position used to manage the child's behaviour. He suggested that it was a "*grey area*". It is in this context that he referred to the need for a "*dynamic risk assessment*" to keep everyone safe until the safest restraint technique could be applied. Mr Long was taken to the incident on 29 June 2009 which records Ms Pusey holding FSX face down on his bed. He appeared reluctant to accept that FSX had been held face down despite the clear wording in the log. When pressed, by Ms Walker, he stated that he could "*only agree to what it says.*" When similar questions were put to Ms Day in cross-examination, she suggested that on 16 June 2009, although the record states that FSX was held on the ground with weight applied to his back, he might have been on his side. In respect of 15 September 2009, when FSX was placed in a wrap by Ms Pusey and then pushed onto the ground face down, Ms Day suggested that it was not a face-down restraint; Ms Pusey was doing what was necessary and proportionate to keep herself safe. Mr Vince also appeared to suggest that a restraint would only be a restraint if an approved technique had been used. Although Mr Vince did not refer to face-down restraints in his expert report he stated during cross-examination, that "*there were occasions where [FSX] was held on the floor or towards the floor face down, ...they were not taught techniques, so they were not techniques.*" He described this as an "*unplanned intervention*".
110. The difficulty with the evidence of the lay witnesses and Mr Vince is threefold.
111. First, as accepted by Mr Long, staff members were required to keep accurate records. There was no reason to doubt the accuracy of the incident log and the ordinary natural meaning of the words used in all three entries was that physical force was used to restrain FSX due to his behaviour. Nor can there be any dispute that on each of these occasions FSX was in a face-down position which the Policy expressly prohibits. No-one present at the time of the incident was called to give evidence. If they had been, it is unlikely that their recollection more than a decade after the relevant event would be more reliable than the contemporaneous written record which, in my judgment, speaks for itself.

112. Secondly, the Policy does not qualify the prohibition in any of the ways the witnesses tried to suggest would make a face-down restraint permissible, i.e. through dynamic risk assessment or emergency circumstances. Mr Vince accepted, during his oral evidence, that the best way to assess if there has been compliance with the standards and guidance is to see if there is a policy and if it has been followed. When he was asked, during cross-examination, why he had not included in his report the section in the Policy which prohibits face-down restraints, he stated: *“At the time I didn’t think I needed to put it in there.”* This was a curious response given that the Particulars of Claim refer to the three instances when FSX was held face down. Mr Vince did not address all three of these incidents in his report. He only referred to the incident that took place on 16 June 2009. As submitted by Ms Walker, the report contained no analysis of this incident either by reference to the training in restrictive interventions that the staff member had received, or the Policy. Regrettably, I concluded that omitting any reference to the prohibition of face-down restraints as set out in the Policy was an example of Mr Vince not treating FSX’s case with the impartiality which his duty to the court requires.
113. Thirdly, the 2002 Guidance makes an important distinction between planned and emergency or unplanned use of force. Emergency or unplanned interventions occur in response to unforeseen events. Mr Vince did not include the section in the 2002 Guidance on planned physical intervention in his report, but he agreed, during his oral evidence, that the requirements for planned physical intervention strategies are an important part of that guidance. The behaviour of FSX could not be properly described as *“unexpected”*. His unpredictability was entirely predictable and was a key feature of his behavioural issues. As Mr Long made clear in his witness statement FSX could lash out violently as he did when he stabbed the gap year student in the face with a fork even though beforehand, he had appeared calm. In oral evidence, Mr Vince agreed with the evidence of Ms McKenzie that the planned physical intervention strategies should be in the ITP and should be specific to the child because there could be some techniques which were not effective for that child. Yet there was no record of a risk assessment identifying the benefits and risks associated with the application of different intervention techniques in the April 2009 version of the ITP; nor in the September 2009 version. Mr Vince also accepted that there was no evidence that the School consulted with FSX’s parents on the physical intervention strategies to be used.
114. The Policy does not permit the restraint of a child face down and for the reasons set out above, the battery claim is made out in respect to the incidents that took place on 16 June 2009, 29 June 2009 and 15 September 2009.
115. In the event, that I am wrong about the effect of the Policy I will address the reasonableness of the face-down restraints. Whether the use of force was reasonable depends on a number of relevant factors including the content of the Policy, appropriate training, and the age and size of the child. As I have already stated the Policy prohibited the use of face-down restraints. Furthermore, Ms Pusey had not received any training in the use of face-down restraint techniques. Ms McKenzie expressed the view in her report that FSX’s size and build were relevant and in cross-examination referred to his *“slight build.”*
116. In his report, Mr Vince did not refer the size and age of FSX when concluding that the School:

“...acted reasonably and competently at all times and within permitted limits and constraints in its use of Physical Intervention/Restraint, the type of measure used, the length of the Physical Intervention/Restraint, the recording of the measure, and the involvement of the child...in subsequent discussions about the use of the Physical Intervention...”

However, during his oral evidence, Mr Vince agreed that the size and build of a child is a relevant factor. The records indicate that as of September 2009, FSX was 142.6cm (4ft 6) and 33kg (50th centile for his age). Ms Day stated in her witness statement that Ms Pusey was “*the same size*” as FSX. I accept the submission made by Ms Walker that if that was the case it calls into question the appropriateness of Ms Pusey being left in situations where she may have to restrain FSX on her own particularly as on other occasions multiple individuals were required to put into effect a safe restraint. Paragraph 5.1 of the 2002 Guidance provides that the setting should ensure “*that the number of staff deployed and their level of competence corresponds to the needs of children and service users and the likelihood that physical interventions will be needed. Staff should not be left in vulnerable positions.*”

117. It was suggested that it was reasonable for Ms Pusey to restrain FSX in the way she did because she was responding to an emergency situation and was required to undertake a dynamic risk assessment. As stated above, there was no such exception within the Policy. But, in any event, FSX’s behaviours were well known. By the time of the first of the three face-down restraints, FSX had been at the School for one year and had been physically restrained multiple times every single month. Mr Vince suggested, during his oral evidence, that the face-down restraint applied by Ms Pusey on 16 June 2009 constituted an emergency response because FSX had behaved unexpectedly. He stated during cross-examination that setting off the fire alarm was “*not previously expected behaviour.*” It was then put to Mr Vince that in his own report, he had referred to an incident from April 2009 where FSX had set off the fire alarm, and touch support was initiated. Mr Vince agreed that two months “*could be sufficient time*” to put a strategy in place to manage this kind of behaviour. This was another example, of Mr Vince not treating FSX’s case with the impartiality which his duty to the court requires.
118. Ms Day indicated, during her oral evidence, that she had a conversation with Ms Pusey following after the incident on 16 June 2009. Her recollection of the discussion was that she was satisfied that the restraint applied by Ms Pusey was reasonable, necessary and proportionate. There was no reference to this discussion in her witness statement. When it was put to Ms Day that there was no written record of this discussion she stated, “*... if after investigation it was found it was not appropriate I would have put it in writing.*” Ms Day went on to state: “*It was a temporary thing while she was trying to get help.*” Ms Day did not appear to have considered this discussion to be significant as she did not refer to it in her witness statement. Ms Day stated in her witness statement that if someone was not fully trained, they could not work alone or physically intervene. During cross-examination, Ms Day indicated that Ms Pusey had received additional training but there was no documentary evidence of this within the trial bundle. In any event, Ms Pusey went on to restrain FSX face-down on two further occasions.
119. Pulling these threads together. I am satisfied that the face-down restraints on 16 June 2009, 29 June 2009, and 15 September 2009 were not reasonable for the following inter-related

reasons: (i) they were contrary to the Policy; (ii) Ms. Pusey had no training in applying such restraints; (iii) applying face-down restraints without appropriate training increases the risk of harm; (iv) given FSX's known behaviour profile there was no proper basis for an "emergency" or "dynamic" response; and (v) to the extent that Ms Pusey's size contributed to the need to improvise this was also a known factor and she should not have been permitted to work with FSX alone if she was unable to restrain him in accordance with the Policy.

120. I turn to the four other instances of restraint identified by both Ms McKenzie and Dr Rippon. Within the records from the School, there are numerous occasions when FSX was restrained by members of staff. In her report, Dr Rippon highlighted three incidents which took place on 4 July 2008, 6 July 2008, and 14 July 2008. Dr Rippon stated that on 4 July 2008 and 6 July 2008, FSX was presenting with an agitated and over-excited manner, there did not appear to be any significant risk to him or other people. However, physical restraint was used. In respect of the restraint on 14 July 2008, Dr Rippon stated that FSX was given a degree of space after becoming silly "*but was then stopped*" at which point he became aggressive and tried to bite. He was then restrained in a seated escort for five minutes. FSX was aggressive whilst being restrained and wet himself. Dr Rippon considered that the restraint may have been avoided if a different approach had been used to FSX's excitable behaviour, rather than attempting to stop him. Ms McKenzie identified an instance in which FSX was restrained in a supine position by two members of staff on 22 July 2008 and considered this inappropriate and unreasonable use of force given FSX's age. The record for this incident included FSX's comment on a scratch or graze on his arm that he felt had been caused by Carolyn Sweet.
121. Ms Foster directed a number of criticisms towards the evidence of Ms McKenzie and Dr Rippon including their lack of expertise in respect of residential children's homes. As stated above, Dr Rippon is qualified and competent to give expert evidence on the use of physical restraint and seclusion. Ms McKenzie is also qualified and competent to give evidence on these issues based on her experience as a social worker. She stated, during her oral evidence, that she had visited children's homes as part of her role and worked in CAMHS. I have already addressed the use of the supine restraint in respect of Dr Rippon's evidence and the same applies to the evidence of Ms McKenzie.
122. In my judgment, the context within which the staff operated is very important. Within the environment of a specialist school where children may act unpredictably and sometimes dangerously the carers bear a great responsibility. Whilst there are some risks that no reasonable school, carer or teacher would permit (throwing objects in the classroom for example) there are other risks where it would be reasonable to adopt a flexible approach. There will, of course, be situations in between which allow for a measure of discretion and judgment on the part of the carers. In these circumstances, I took the view that a court should be slow to substitute its own judgment where the carer can be expected to have knowledge of the school, the environment, the particular children in their charge and their experience. In the context of FSX's frequent challenging behaviour, due respect must be given to the decisions that were made by his carers in implementing the Policy by using de-escalation techniques, wherever possible. I was satisfied that in these instances the staff did what was necessary to protect FSX and/or staff, to prevent damage to property or to maintain order in the classroom.

123. In reaching this conclusion, I accepted the evidence of Mr Vince that the School specialised in caring for and educating vulnerable children with complex special educational needs. It is reasonable to expect the legitimate use of physical restraints and the frequency of such restraints to be higher than in other educational settings. Within that context FSX's behaviour, as evidenced by the contemporaneous records, was particularly "*high profile*" as confirmed by Mr Lole.
124. For these reasons, I concluded that the four additional incidents (which did not involve face-down restraints) did not amount to assault/battery.

False Imprisonment

125. The School records confirm that on 14 occasions the towel method was used. On one occasion, namely 15 May 2009, this method was used from 5.15pm until 10pm. FSX's case was that the towel method prevented him from leaving his room and was a seclusion and would have been inappropriate no matter how long it had lasted. The door to FSX's room was not "shut", in that, there was a gap through which the member of staff could speak to him.
126. Ms Day stated, in her witness statement, that she was aware that FSX's restraints were increasing, and she was concerned. She suggested to staff that they should walk away from FSX, but this proved to be ineffective as he would continue to "*attack*" and members of staff would have to use cushions to ward off the blows. She did not provide a timeframe but stated that FSX became a lot bigger and stronger within a short period of time. She also stated that FSX appeared to like the physical contact involved in applying a restraint. As a consequence, other methods were tried including "*using a door in between to allow [FSX] to calm down.*" In her witness statement, there is then a sub-heading entitled - "*The use of towel holding the door*" and the first sentence states as follows: "*This is where the strategy with the door and towel came in as it enabled the staff to put some distance between them and [FSX] when he was attacking them.*" The towel would be looped around the internal handle and pulled to but there was a gap through which the staff could constantly have FSX within sight and communicate with him. As soon as FSX stopped attacking and moved away from the door it would be opened.
127. During her oral evidence, Ms Day suggested that the towel method was an unplanned or emergency intervention. However, the natural reading of her witness statement is that it was a strategy that was developed in direct response to the increase in physical restraints and the failure of alternative behaviour management methods. It was therefore a planned intervention. Ms Day appeared reluctant to accept that the towel method would constitute a planned intervention strategy even though her email, dated 1 July 2009, indicated that it was a strategy that had been in place for at least seven months. She stated that the School "*did plan to use it with [FSX] but it had already been developed.*" She disputed the towel method constituted a physical restraint and suggested that the matter had been discussed with JLM. She did not accept that the content of JLM's email, dated 8 September 2009, suggested that that was when he first became aware of its use. In that email, JLM stated:

“Secondly, two member of staff...informed me that [FSX] was forcibly detained in his room for two hours today. As bedroom doors have no locks on them (for legal reasons), the staff use towels to loop round the inner handle and force the bedroom door shut from the other side. Clearly, using towels to force the door shut in this way so that the child cannot open it has the same practical effect as locking it with a key. The school does not have the required approval to forcibly detain children in their [rooms] for any length of [time], and [therefore],... this practice is unlawful to all intents and purposes and must stop In (sic) line with current legislation.”

128. Ms Day appeared to have no recollection of the meeting on 14 September 2009, where FSX’s social worker had expressed concern about the use of the towel method. No doubt this was due to the passage of time. If Ms Day had remembered, it is unlikely that she would have stated in her witness statement that she was not aware of any concerns being raised about this method. During the meeting on 14 September 2009, it was agreed that the towel method would no longer be used. However, it was used two days and three days after that meeting. Ms Day suggested that the information may not have been passed on to all members of staff. For example *“someone could have come back from holiday.”*
129. Secure accommodation approved by the Secretary of State is accommodation to restrict a child’s liberty. During his oral evidence, Mr Vince confirmed that the School was not secure accommodation, and that FSX was a *“looked after”* child. Dr Rippon stated in her report that the towel method was a form of seclusion and would be inappropriate at any length. During cross-examination, Mr Vince appeared to agree that the towel method was a seclusion but then sought to resile from that position by suggesting that it was an *“internal seclusion”*. However, his original response was consistent with his report in which he had included the definition of seclusion (albeit from the 2019 version of the Guidance - *“a form of restraint referring to the supervised containment and isolation of a child or young person away from others, in a room/area from which they are prevented from leaving”*). Mr Vince stated in his report that the towel method was a *“reasonable method of managing the situation”*.
130. There is nothing in the Policy which describes the use of the towel method, and the circumstances in which it is appropriate to be used. Furthermore, there was evidence that the Local Authority disapproved of the strategy. However, the real difficulty with the evidence from Ms Day and Mr Vince was that the towel method was a physical intervention. It was also planned in the sense that there was no evidence before me that it arose within the context of an *“unexpected”* event. Therefore, there was a requirement for the intervention to be: (i) agreed in advance by a multidisciplinary or school team working in consultation with FSX and his parents; (ii) described in writing and incorporated into other documentation such as the ITP (or elsewhere in documents relating to him), and (iii) implemented under the supervision of an identified member of staff who has undertaken appropriate training. There was no documentary evidence to suggest that this had been discussed with FSX’s parents. Ms Day conceded that JLM was not slow to raise concerns with the School. However, she was resistant to the suggestion that the first time JLM was made aware of the use of the towel in the door was on 8 September 2009. However, the only document which refers to it is Ms Day’s email, dated 1 July 2009, which post-dates the first use of that strategy.
131. For these reasons, I concluded that the seclusion of FSX through the use of the towel method constituted unlawful imprisonment.

Negligence

132. The existence of a duty of care is accepted by the School. The central issue is whether the care FSX received fell below the standard that would be considered to be reasonable by a reasonably competent body of practitioners.
133. Having found that on three occasions the School's actions constituted battery and on a number of occasions FSX was falsely imprisoned I went on to consider the remainder of his claim. The remaining issues related to: (i) failing to manage his behaviour appropriately taking into account his ASD; (ii) failing to implement alternative strategies to manage his behaviour; (iii) failing to adequately engage external support; and (iv) exposing him to the sexualised behaviour of other pupils.
134. I gave very significant weight to the contemporaneous records. I accepted that the reports of incidents were accurate and reflected a fair and reasonable judgment of FSX's very challenging behaviour. I accepted the picture it painted of FSX's school life and how the School functioned. Although I have made adverse findings, I am satisfied that the School staff were caring and had a real sense of duty and responsibility to FSX whilst working in a very demanding educational environment. The restraints and physical interventions would have been lawful if the Policy and 2002 Guidance had been followed or if FSX's behaviour had been unexpected. I accepted that, although the skills and abilities of the individual staff members will have varied, the ethos of the School meant that the teachers and support workers would have had a comparable commitment to providing a positive therapeutic environment for FSX. Although I did not accept everything the staff members said, particularly where it was contradicted or undermined by the contemporaneous records, I found that the staff members who gave evidence during this hearing did their best to assist me bearing in mind the passage of time and the effect this had on their ability to recollect the detail or sequence of events. FSX was restrained (save for the face-down restraints and false imprisonments for the reasons I have already articulated) as a last resort in the context of a well-managed school environment. It was used only when necessary for the protection of FSX and/or staff; to prevent damage to property and to maintain order in the classroom.
135. During his oral evidence, JLM stated he was an active parent and was "...doing [his] best". I have no reason to doubt that he did his best. He did not attend a number of the meetings at the School and at times he would inform the School that he would be attending but then not show up. I did not take this as a lack of interest on his part and noted that for at least part of the relevant period he was living in Scotland. I noted that he cared for FSX during some of the school holidays. Although JLM could not be properly described as an absent father there did appear to be a period when he became much more engaged, and it was noticeable. I concluded that he had minimised the number of times he "*disappeared*" when FSX was younger and the duration of those disappearances. Although JLM had some insight, at times during his evidence, he appeared to be reluctant to face up to reality about the home circumstances, and the impact on his son's emotional and behavioural development whilst he was at the School. However, he was forthright about the unacceptability of the FSX's behaviour, though disagreeing at times about its extent and its causes. His determination to make others aware of FSX's ASD and respond to his difficulties came across strongly. He had FSX's best interests at heart, but I was satisfied that the School was an appropriate

placement, and it would be speculative to suggest that an autism-specific school would have made a difference.

136. Ms Walker made many criticisms about the quality of Mr Vince's analysis and criticisms were made by Ms Foster about Ms McKenzie and Dr Rippon. Each of the breach of duty experts had some valuable contribution to make to my understanding of the education of those with ASD and behavioural and emotional difficulties. However, Mr Vince had broader experience based on the many years he had spent in the management of residential children's homes across a range of schools. Ms McKenzie and Dr Rippon were sincere in their evidence but in the end, I concluded that FSX's test for negligence was too high. The areas of dispute were in the interpretation of a limited number of incident logs and whether the records revealed events which fell below the standards of care that would be acceptable by a reasonable body of practitioners working in similar circumstances. Undoubtedly, other things could have been tried to manage FSX's behaviour, alternative steps could have been taken and more efforts could have been made to engage external assistance. But in reality, there are always limitations including time and resources.
137. Having heard and considered all the evidence and submissions I concluded that FSX had not established negligence; they are criticisms of acts and omissions and at times were counsels of perfection and hindsight. I shall deal with the allegations on their merits.
138. There were factors at play within FSX's home circumstances which affected his behaviour. The School took a holistic view of FSX's presentation including his behavioural and emotional issues. If FSX was in a secure and stable school and home environment the expectation was that he would make reasonable progress. Whether FSX's behavioural and emotional issues rather than his ASD alone were the main cause of his difficulties could be debated endlessly. However, the fact that there may have been a component of FSX's behaviour which was related to his ASD does not alter the significance of his behaviour nor the need to address it to enable him to develop. FSX was often a seriously disruptive pupil. Although there was some improvement, towards the end of FSX's placement at the School his behaviour became progressively worse despite the endeavours of the School. Nonetheless, the School's approach was on the whole a reasonable one, and they were in the best position to judge what was necessary. I accepted that criticisms could be levelled at the School for the fact that there is no mention of the confirmation of the ASD diagnosis in the ITP. But I do not consider that what the School did or omitted to do could be properly described as negligent.
139. Ms Walker submitted that both Dr Rippon and Ms McKenzie's opinions that the strategies deployed by the School were deficient is reflected in the view given by Mr Daryl Jones, Educational Psychologist both orally to the School (at the time of the review meeting on 19 May 2009) and in his report dated 20 May 2009. I did not accept this submission. The holistic multi-disciplinary approach of the School was entirely appropriate, and the implementation of additional strategies was a judgment call for the School. The fact that ultimately the strategies that were implemented did not work does not mean that they were not appropriate. It is speculative whether the specialist input recommended by Mr Jones would have made any difference. In any event, Mr Jones' report was not received until shortly after JLM withdrew FSX from the School. I was not persuaded that the School acted negligently.
140. As for seeking external support and intervention, Dr Rippon during her oral evidence, expressed the view that given the frequency of FSX's behaviours, the School should have

sought support and intervention at an earlier stage. It was submitted by Ms Walker that despite evidence that the School was struggling to manage FSX's behavioural needs, no steps appeared to have been taken to seek external support or raise the issue with the Local Authority. I concluded that this did not amount to negligence. The School had teachers, carers and support workers who were familiar with various techniques capable of modifying FSX's behaviour. There were possible alternative techniques and interventions available but the failure to take that particular step earlier was not negligent. In any event, I was not persuaded that the School was under any duty to engage external support for FSX.

141. No evidence was led during the trial about the alleged sexualised behaviour of other pupils. As submitted by Ms Foster, the only evidence on this subject was in respect of FSX's own sexualised behaviour, which Ms McKenzie agreed had been handled appropriately.

Conclusion

142. For the reasons, set out above, the allegations of battery and false imprisonment have not been out. However, the School was not negligent, and that aspect of the claim is dismissed.
143. The parties are directed to seek to agree the terms of an Order that reflects my conclusions and deals with any other consequential matters including damages and costs. In the absence of agreement, the parties are at liberty to make an application in writing within 14 days following the formal hand-down of this judgment (for which the parties need not be present). If such an application is made, the opposing party will have another 7 days to respond in writing. If there are any consequential matters, they will be determined either in writing or at a hearing.

Appendix 1

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Case No: QB-2020-001662

Royal Courts of Justice
Strand, London, WC2A 2LL

Before:

Margaret Obi
(sitting as a Deputy High Court Judge)

Between:

FSX (through his father and litigation friend - JLM)

Claimant

- and -

Mulberry Bush Organisation Limited

Defendant

Amelia Walker (instructed by **Leigh Day**) for FSX
Catherine Foster (instructed by **DWF**) for the **Defendant**

Hearing dates: 2-7 February 2023 and 22-23 June 2023
(adjourned part heard)

INTERIM JUDGMENT

Margaret Obi:

Introduction

1. The liability and quantum trial in respect of the FSX's claim for damages commenced on 2 February 2023 and has been adjourned part heard on two occasions. The trial is due to resume on a date yet to be confirmed. This is a draft interim judgment in relation to the scope and extent of the evidence that the court will permit one of the expert witnesses to give.
2. This judgment will be incorporated into the final judgment when this case concludes.

Background

3. The claim can be briefly summarised as follows.
4. FSX is a young man with a diagnosis of Autism Spectrum Disorder and a mild learning disability. At the age of 9, he was placed at Mulberry Bush School ('the School' or 'the Defendant') by the London Borough of Camden Children's Social Services on 19 June 2008 and remained there until September 2009 when he was withdrawn by his father.
5. FSX alleges that, whilst he was a registered pupil, the School:
 - i) acted negligently and in breach of its duty by (amongst other things) restraining him frequently and with excessive force; inappropriately confining him to his room; and failing to manage his behaviour appropriately.
 - ii) further, or alternatively, the incidents of restraint constituted acts of assault and/or battery and/or trespass to the person; and
 - iii) deprived him of his liberty, on at least two occasions, by placing a towel in the doorway of his room to prevent him from leaving.

Scope of Dr Rippon's Evidence

6. On 25 June 2021, following a directions hearing, Master Brown issued a number of case management directions. Paragraph 6(g) of the order states:

"There be permission to each party to call the experts set forth above to give oral evidence at trial limited to the areas upon which they remain in in substantial and material disagreement (sic)."

7. At the outset of the trial there was a dispute between the parties as to whether Dr Ann Marie Rippon, a Consultant Psychiatrist (instructed by FSX) and Dr Audrey Oppenheim, a Consultant Child & Adolescent Psychiatrist (instructed by the School), should be called to give evidence.

8. It was submitted by the School that there was no permission to call the psychiatric experts to give oral evidence as there were no areas upon which they remained in substantial and material disagreement. FSX disagreed for reasons which are not necessary to set out in this short interim judgment. For present purposes, it is sufficient to state that I informed the parties that I would hear from both experts with regard to the narrow issues in dispute and, in due course, determine to what extent, if any, their evidence is of assistance in determining the outcome of this claim.
9. On Day 6 of the trial (23 June 2023) an issue arose as to whether Dr Rippon should be permitted to provide opinion evidence with regard to the management of the FSX's behaviour in a residential setting and the use of restraints.
10. Dr Rippon produced four reports in total: (i) Liability Report dated 12 October 2016; (ii) Condition & Prognosis Report dated 15 December 2017 (iii) Addendum Condition and Prognosis Report dated 3 May 2018; and (iv) Liability Report dated May 2022. The fourth report followed Master Brown's direction, on 25 June 2021, that FSX has permission to rely on expert evidence from Dr Rippon on the issue of breach of duty including her report dated 15 December 2017 and replies to the FSX's CPR Part 35 questions dated 3 May 2018 (the third report). FSX was ordered to serve any further existing reports from Dr Rippon on the issue of breach of duty and any further report from Dr Rippon upon which he wishes to rely. FSX was also granted permission to rely on an independent social work expert. The School was granted permission to rely on expert evidence on the issue of breach of duty from Mr. Matthew Vince, a care and education management expert, and Dr Audrey Oppenheim, Consultant Child & Adolescent Psychiatrist.
11. Ms Syliva McKenzie was subsequently instructed by FSX to provide a social work expert report. Following a discussion between Ms McKenzie and Mr Vince on 21 November 2022 they produced a joint expert report dated 8 December 2022. Dr Rippon and Dr Oppenheim had a meeting on 15 November 2022. They produced a joint expert report in December 2022.

Submissions

12. In summary, Ms Foster submitted that it was not the Defendant's understanding that Dr Rippon's evidence was to be relied upon in relation to the management of the FSX's behaviour in a residential setting and the use of restraints as other expert witnesses address these issues. She submitted that at the time Dr Rippon prepared her older reports she did not have access to all the documentation. Her fourth report addresses psychiatric issues and refers to information contained within her earlier reports. Ms Foster further submitted that if Dr Rippon was to be presented as an expert on residential settings and restraints, she should have discussed her opinions

with the Defendant's Care and Management Expert - Mr Vince. However, a joint discussion only took place between Mr Vince and Ms McKenzie.

13. Ms Foster invited the Court to limit the scope of Dr Rippon's evidence.
14. Ms Walker submitted that Master Brown's order does not include any direction to the effect that *all* the breach of duty experts have to meet; nor is there any reference to experts in the management of residential settings. Ms Walker further submitted that the directions hearing was a contested hearing. No issue was raised with regard to the FSX's reliance on Dr Rippon's reports and there was no suggestion that her earlier reports would be disregarded.
15. Ms Walker submitted that she was entitled to rely on all four of Dr Rippon's reports. Dr Oppenheim did not address breach of duty issues in her report and as she had not undertaken any analysis of the use of restraints, she was not competent to offer an opinion. It was submitted that it was for this reason that Dr Oppenheim's meeting with Dr Rippon focussed on issues where they are both competent.

Decision

16. Master Brown permitted both parties to rely on expert evidence on the issue of breach of duty. For whatever reason, Dr Oppenheim's report did not address breach of duty issues in her report but that does not mean that FSX cannot rely on the evidence of Dr Rippon in relation to these issues. No limit was placed on the reports from Dr Rippon that FSX could rely upon, save for relevance. Master Brown directed that FSX could rely on the expert evidence of Dr Rippon *including* her second report dated 15 December 2017 and her replies to the FSX's CPR Part 35 questions. Amongst other things, FSX was ordered to serve any further report from Dr Rippon that he intended to rely upon and did so. Any objection to the FSX's reliance on these reports should have been made at the time, and in any event, long before the commencement of the trial.
17. The natural reading of Master Brown's order is that all the breach of duty experts were required, in accordance with Rule 35.12 of the Civil Procedure Rules, to have a without prejudice discussion for the purposes of providing a joint report, unless the reports are agreed. At that time it was anticipated that Dr Oppenheim would provide a breach of duty report and therefore it was reasonable to expect a discussion to take place amongst *all* the breach of duty experts. However, as Dr Oppenheim did not address the issue of breach of duty, it is perfectly understandable that her discussion with Dr Rippon focussed on medical issues and that Mr Vince and Ms McKenzie

discussed the care and management issues. If the Defendant was not content with any aspect of this arrangement their concerns should have been raised much earlier.

18. Furthermore, to the extent that the issue relating to the scope of Dr Rippon's evidence may be based on a misunderstanding between the parties I am not persuaded that this should result in a limitation being placed on her evidence. In reaching this conclusion I am satisfied that Master Brown's order is clear (see paragraph 16 above).
19. For these reasons, FSX is permitted to rely on Dr Rippon's evidence in relation to the medical issues and breach of duty. However, in accordance with my decision at the outset of the hearing, Dr Rippon's oral evidence will be limited to the areas where there is a material dispute. Ultimately, it will be for the court to determine to what extent, if any, it is assisted by the expert evidence.