Neutral Citation Number: [2024] EWHC 2844 (KB)

Case No: QB-2020-001662

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice Strand
Strand, London, WC2A 2LL

Date: 8 November 2024

Before:

MS MARGARET OBI
(Sitting as a Deputy of the High Court)

- -

Between:

FXS
(through his father and litigation friend JLM)

Claimant

- and -

THE MULBERRY BUSH ORGANISATION LTD

Defendant

- -

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

- -

Approved Judgment

This judgment was handed down remotely at 10:00 on 8 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Ms Margaret Obi:

Introduction

1. This judgment relates to damages and costs.

2. FXS is the claimant. He was placed at the Mulberry Bush School ("the School") on 19 June 2008. He was aged 9 at the time of the placement and remained at the School until September 2009, when he was withdrawn by his father - JLM. FXS alleged that during his placement the School 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. Further, or alternatively, assaulted him during the restraints, and/or the acts of restraint constituted battery, and/or trespass to the person. It was also alleged that the School falsely imprisoned him, on at least two occasions, by placing a towel in the doorway of his room to prevent him from leaving.

3. On 10 June 2024, (following a 9-day trial heard in three different tranches over the course of a year) I handed down my judgement on liability only. See [2024] EWHC 1406 (KB) for the full background circumstances and reasons for concluding that:

    i. on three occasions FXS was restrained face-down by a member of staff (Ms Pusey) and each occasion constituted battery (unlawful touching).

    ii. the seclusion of FXS, by placing a towel in the doorway of his room to prevent him from leaving, constituted unlawful imprisonment. This occurred on 14 occasions, including 15 May 2009, when FXS was falsely imprisoned for nearly 5 hours.

    iii. the allegations of negligence were not made out.

4. The recoverable damages and costs remain in dispute. After my judgment on liability was handed down, the parties were directed to provide written submissions. FXS claims basic and aggravated damages. He also claims costs on the indemnity basis. I have set out below, a summary of the written submissions provided by both parties, but I have not addressed every point that was raised; only such matters as have enabled me to determine the outstanding issues.

Damages

Submissions – Assault and Battery

5. Ms Walker submitted that the face down restraints were inevitably humiliating and degrading, as well as dangerous, given the risk of not being able to breathe. She challenged the submission that had been made by Ms Foster (at the end of the trial) that, "*the vast majority of restraints were appropriate in light of [FXS's] behaviour, [FXS] would therefore have been unavoidably distressed in any event and the limited incidents in question would represent only minor transitory events in the overall scheme of his placement…"* and that any damages would sound in the "*hundreds*". Ms Walker submitted that FXS is entitled to substantial damages, and any suggestion that the impact of a battery is lessened by other experiences of legitimate physical contact, is not supported by authority. Ms Walker further submitted that the face down restraints were clearly not "*minor transitory events*," because FXS specifically reported them to his father.

6. As to the quantum of basic damages, Ms Walker relied on *Shah v Gale* [2005] EWHC 1087 (QB). In the *Shah* case, Mr Justice Leveson (as he then was) awarded £750 in basic damages to compensate Mr Shah's estate for *"…the physical discomfort, distress and inconvenience of the assault committed in the very short space of time between the moment when his home was unlawfully entered and the knife attack without any reference to personal injury."* That sum, with inflation and the relevant uplift, would today be £1,660.31. The learned judge in *Shah* also awarded aggravated damages in the sum of £2,000 (which would now be £4,427.50). Ms Walker submitted that as there was no battery in the *Shah* case, FXS should be awarded basic damages in excess of £1,660.31. She invited the Court to award damages in the sum of £3,000 for each battery, making a total of £9,000.

7. Ms Walker submitted that aggravated damages would be appropriate for the following reasons:

   i. There was a clear breach of trust as the School contravened its own behaviour policy (*"Handling Difficult Behaviour and the Use of Sanctions"*) ('the Policy').

   ii. Ms Day (Head of Group Living) was apparently aware of the first battery and that Ms Pusey's size made it difficult for her to control FXS, without resorting to battery.

   iii. There was a failure to grasp the seriousness of a staff member utilising a face-down restraint.

   iv. There was a stubborn refusal to accept responsibility throughout the litigation which was high-handed.

   v. The School sought, contrary to the evidence, to minimise the impact on the Claimant in a way that was particularly callous.

8. Ms Walker submitted that aggravated damages in the sum of £8,000 would be appropriate.

9. Ms Foster submitted that the incidents of battery justify only a very modest award of damages. She invited the Court to take into account the following matters:

   i. The batteries comprised only part of each episode of physical restraint.

   ii. For the best part, the three restraints in question were justified.

   iii. It is unlikely that FXS would have understood the subtle difference between a face down restraint and other methods of restraint.

   iv. FXS was restrained legitimately on 117 occasions between June 2008 and September 2009, against the background of 550 recorded incidents of disruptive behaviour.

   v. If FXS had not been held in a face down position, it would have been legitimate to restrain him in some other position, including a supine position.

   vi. As agreed by all of the experts, the balance of the restraints made were a necessary and proportionate means of managing FXS's disruptive behaviour.

   vii. FXS is not likely to have been any more or less distressed on the three occasions in question, than he was on the other 114 occasions of lawful restraint.

viii. Notwithstanding the three isolated findings of battery, Ms Pusey was doing her best to manage FXS in order to prevent injury to him, to other children, and to herself.

10. Ms Foster submitted that, in determining the quantum of damages, the Court may be assisted by considering the JC Guidelines (17th Edition) - Chapter 14 "Minor Injuries ("minor injuries guideline"). She invited the Court to note that a minor injury, with recovery within seven days, would attract an award of "*a few hundred pounds to £840*".

11. Ms Foster submitted that to the extent that Ms Pusey engaged in restraints outside the terms of the Policy, this was done in extremis and not due to any deliberate intent. Furthermore, there is no evidence that her actions endangered FXS; in fact, they kept him safe. Ms Foster submitted that the suggestion that Ms Day "*allowed*" Ms Pusey to commit two further assaults is absurd. She further submitted that the suggestion that the School was "*high-handed*" and "*callous*," in its defence of the claim, is inappropriate and ignores the fact that the School succeeded in its defence of the best part of the claim.

Assessment of Damages – Assault and Battery

12. Damages for assault and battery can be awarded absent injury (see McGregor on Damages, 22nd edition (at §43-001)). FXS was not physically injured as a result of the face down restraints. Therefore, compensatory damages are limited to injury to feelings (i.e. discomfort, disgrace, and humiliation). There are no directly comparable cases. In any event, comparable cases are illustrative only; they should not be regarded as providing a rigid benchmark as each case will be fact sensitive. They provide some indication of the general level of compensation that may be awarded to achieve a degree of consistency. Aggravated damages (if claimed) can be awarded in addition to basic damages, where there are features about a defendant's conduct justifying such an award - see *Thompson v Commissioner of Police of the Metropolis and Hsu v the same* [1998] Q.B. 498 CA per Lord Woolf at p 514G-H). Such features *may* include insulting, malicious, oppressive, or high-handed behaviour by those responsible for the assault/battery or the way in which the litigation has been conducted.

13. On 16 June 2009, FXS was held on the floor by Ms Pusey with weight applied to his back. The records do not indicate how long FXS was held in this position, but it was long enough for Ms Pusey to call for support and for another member of staff to attend his room. Approximately two weeks later, on 29 June 2009, Ms Pusey held FXS in a wrap (holding his arms across one another) face down on his bed. FXS was held in this position for "*roughly 10 minutes before being able to talk about what could help him to settle.*" Given the context, this was on any view, a long time. On 15 September 2009, FXS was put in a wrap and pushed onto the ground face down by Ms Pusey. The length of time FXS remained in this position is unknown, but it was long enough for Ms Pusey to call for support and for two members of staff to attend.

14. Ms Pusey was not a witness at the trial, but even on the assumption that she was doing her best to keep FXS and others safe from harm it would not, as submitted by Ms Walker, render each face down restraint any less of a battery. There is an inherent risk to safety in the use of face down restraints as they may cause breathing problems due to the compression of the chest and airways. Staff were not trained in face down restraint techniques and the Policy expressly prohibited face down restraints. Although FXS was frequently made subject to physical interventions, being restrained in a face down position was inevitably a degrading and humiliating experience. I reject the suggestion that the batteries were part of what was otherwise a lawful restraint. The records do not indicate that the face down restraints were accidental; on each occasion FXS was held in a wrap in a face down position. As stated above, on 16 June

2009, weight was applied to FXS's back whilst he was on the floor. On 29 June 2009, Ms Pusey held FXS in a face down position for approximately ten minutes and there is no record of a prior physical restraint. On 15 September 2009, there is no indication, from the record, that the wrap that had been applied was ineffective. Nor is there any recorded justification for using an alternative lawful restraint. I also reject the suggestion that the impact of a battery is lessened because FXS would have been physically restrained by some other legitimate method, and I note that no authority for that proposition was provided. In my judgment, the fact that the vast majority of the physical restraints were proportionate, has no bearing on whether FXS is entitled to substantial damages for the restraints which constituted a battery.

15. In their joint expert report, dated December 2022, Ms McKenzie (expert Child Protection social worker instructed on behalf of FXS) and Mr Vince (Care and Education Management expert instructed on behalf of the School) agreed that FXS was distressed by the restraints; this includes both the lawful and unlawful restraints. There was no direct evidence to indicate that FXS found the unlawful restraints more distressing than the lawful restraints. FXS did not give evidence at the trial and, due to the passage of time, the recollection of the factual witnesses was not as clear, or as detailed, as it might otherwise have been. Therefore, the School's records provide the only insight into FXS's presentation immediately after each incident. However, I accept the submission made by Ms Walker that the unlawful restraints could not be properly described as "*minor transitory events*." JLM gave evidence that FXS had specifically reported that he had been restrained face down. This aspect of his evidence was not challenged during lengthy cross-examination. FXS had also complained of being pushed over and bent forward which had made it difficult for him to breathe. It is reasonable to infer, that this was a reference to the occasion when FXS was "*pushed to the ground*" by Ms Pusey and held face down against the bed for "*roughly 10 minutes*". I am satisfied that FXS was distressed and humiliated by the experience of being restrained face down.

Basic Damages

16. In determining the quantum of basic damages, I have taken into account the features referred to in paragraphs 14 and 15 above. Individually and cumulatively, the risks, lack of training, and breach of the School's Policy, are serious. In these circumstances, a substantial award is appropriate. Having used the *Shah* case (noting that there was no battery in that case) and the minor injuries guideline as a cross check, I conclude that each instance of battery should sound in £2,000 in damages, making a total of **£6,000**.

Aggravated Damages

17. It can be difficult to draw a distinction between injury to feelings caused by the wrong itself, and any injury to feelings caused by the manner in which the wrong was committed. As a consequence, there is a risk of double counting or underestimating any compensation. In my judgment, the injury to FXS's feelings caused by the battery itself is adequately compensated by the basic award, save for two key features worthy of particular disapproval:

    i. There was a failure to appreciate the significance and seriousness of a member of staff using a face-down restraint. Ms Day confirmed, in her witness statement and during her oral evidence, that she was aware that FXS had been restrained face down on 16 June 2009 and had discussed this with Ms Pusey after the incident. Ms Day was also aware that Ms Pusey's stature (she was the same size as FXS) made it difficult for her

to control him physically. Nonetheless, Ms Pusey went on to commit two further batteries on FXS.

ii. Throughout the litigation there was a reluctance to acknowledge the School's prohibition on face-down restraints and some witnesses refused to accept the plain wording of the daily incident reports. These reports made it clear that FXS had been restrained face down. Furthermore, Mr Vince made no reference, in his expert report, to the prohibition on face-down restraints in the School's Policy. As stated in my judgment on liability this was *"an example of Mr Vince not treating FSX's case with the impartiality which his duty to the court requires."* Although Mr Vince is responsible for the content of his report, the School chose to rely on it, and did not seek to address this significant omission either prior to, or during the trial. The School knew the content of its Policy on the use of face down restraints. Therefore, the reluctance to acknowledge the breaches of the Policy went beyond "*different interpretations of the facts and legal issues under consideration*" as submitted by Ms Foster.

18. In my view, FXS is entitled to aggravated damages in the sum of **£4,000**.

Submissions - False Imprisonment

19. Ms Walker submitted that this is not a case, in which it would be appropriate for the false imprisonment, to attract nominal damages only. She further submitted that there is no suggestion that the imprisonment would have occurred lawfully under any existing legal and policy framework. She invited the Court to conclude, that in respect of each occasion on which FXS was secluded in his room, he would have experienced some *"shock of detention."* She referred the Court to the following comparable cases:

i. *Ahmed v Shafique and anr* [2009] EWHC 618 (QB): the claimant was awarded what would now be just under £4,000 in basic damages, for 15 hours of unlawful imprisonment, following a false arrest. In addition, the court awarded aggravated damages of what would now be just under £4,000.

ii. *Okoro v Commissioner of Police of the Metropolis* [2011] EWHC 0003 (QB): the claimant was awarded damages in the sum of what would now be £3,712.14 for an arrest, imprisonment for four hours, and assault arising from the use of handcuffs.

iii. *Mohidin v Commissioner of Police of the Metropolis* [2015] EWHC 2740 (QB): the first claimant (Mohidin) was awarded £372.25 in damages for false imprisonment for five minutes and what would now be £3,424.74 in aggravated damages. The aggravating factor was the arresting officer's racist abuse. The second claimant (Khan) was awarded what would now be £6,700.58 for a period of detention of 19 hours and 40 minutes. Mr Khan was also awarded what would now be £10,720.92 in aggravated damages for racist abuse and humiliation in the course of the arrest.

iv. *R (on the application of Mehari)* [2010] EWHC 636 (Admin), the claimant was awarded what would now be £7,756.20 for a 7-day period of unlawful detention.

20. Ms Walker submitted that in respect of the period of false imprisonment on 15 May 2009 (which lasted just under 5 hours) it would be appropriate to make an award of £4,000. The other instances of false imprisonment should each be awarded £1,000. This is less than the guideline in *Thompson* which suggests that an appropriate sum for the "*first shock of detention*" would

be £500 for the first hour (current rates would make it £1,325.76), with an additional sum awarded after the first hour on a reducing scale.

21. Ms Walker also referred the Court to *R (on the application of MK (Algeria) v Secretary of State for the Home Department* [2010] EWCA Civ 980 AC and *AS v Secretary of State for the Home Department* [2015] EWHC 1331 (QB) where aggravated damages in the sums of what would now be £9,538.60 and £7,473.89 respectively, were awarded for false imprisonment. She submitted that, in this case, it would be appropriate to make an award of aggravated damages in the sum of £10,000 in light of the following features:

    i. The School persisted in using a towel around the door to restrain FXS even after social services made it clear that this method was not approved.

    ii. The School persisted in using the towel method despite JLM's objections.

    iii. There was no evidence that the School had at any time sought advice, legal or otherwise, on the use of the towel method.

    iv. The School's refusal to countenance any wrongdoing throughout the course of the litigation gave rise to a peculiar reluctance, by the lay witnesses and Mr Vince, to call a "*spade a spade*."

    v. From November 2015 to February 2022, the School's solicitors made concerted efforts to prevent FXS from being able to bring this claim, by repeatedly asking the Legal Aid Agency (LAA) to discharge his certificate.

22. Ms Foster submitted that, taking into account the following matters, the incidents of false imprisonment justify only a very modest award of damages:

    i. The towel method constituted only short interludes in the context of lengthy episodes of disruptive behaviour.

    ii. It was legitimate for the School to require FXS to remain in his room if he was misbehaving.

    iii. The towel method was employed as an alternative to physical restraint when this had become unsafe.

    iv. During all periods of towel usage FXS was behaving violently and attempting to attack his carers, not because they were using the door to create a barrier, but because he was exhibiting challenging behaviour.

    v. FXS was not likely to have been any more or less distressed on the occasions when the towel method was used, than he was on the numerous other occasions when physical restraint was lawfully applied.

    vi. Notwithstanding the findings of unlawful imprisonment, the carers were clearly doing their best to manage FXS in order to prevent injury to him, to other children and to themselves.

23. Ms Foster referred the Court to the following cases:

    i. *Iqbal v Prison Officers' Association* [2010] 2 W.L.R. 1054: the claimant was confined to a small prison cell in the course of a day without being let out for exercise and other

activities due to unlawful strike action on the part of the prison officers. Although his case failed, an award of £120 would otherwise have been applied for being falsely imprisoned for six hours. This represented £20 per hour (which would now be £202.40 for six hours or £33.73 per hour).

ii. *Taylor v Chief Constable of Thames Valley Police* [2004] 1 W.L.R. 3155: the claimant (a minor) was arrested but not adequately informed of the legal and factual basis of his arrest. The period of his unlawful arrest was initially found to be four hours. Damages were assessed at first instance at £1,500 (which would now be £3,035.33) and included trespass to the person (lifting the claimant's shirt) and an assault. On appeal, the unlawful arrest element was reduced to 1½ hours, and the parties were required to agree a reduced sum. The outcome is unknown.

iii. *Esegbona v King's College Hospital NHS Foundation Trust* [2019] EWHC 88 (QB), [2019] C.L.Y. 1857: the claimant was awarded general damages, damages for false imprisonment and aggravated damages for unlawful detention in hospital for 119 days. The award for the false imprisonment was £130 per day (which would now be £169.74 per day). Aggravated damages in the sum of £5,000 (present day value would be higher) was also awarded because the Trust had deliberately excluded the deceased's family from the decision-making process and failed to follow deprivation of liberty safeguards.

24. Ms Foster submitted that any party may make representations to the LAA if it considers that an action is not sustainable. The LAA is perfectly able to make independent decisions about the funding of litigation. Ms Foster further submitted that the School's representations have been borne out by the dismissal of wide-ranging allegations of negligence.

25. Under the heading "Contributory conduct," Ms Foster submitted that FXS's conduct and challenging behaviour, formed part of the wider picture and should be taken into account in the assessment of damages.

Assessment of Damages – False Imprisonment

26. Compensatory damages for false imprisonment are intended to compensate for the loss of liberty, shock, and humiliation. Loss of reputation does not apply in this case. Once again, there are no directly comparable cases. The daily rates which can be calculated from other awards are by way of cross-check only.

27. FXS was falsely imprisoned on 14 occasions. On each occasion the towel method was used to confine FXS to his room whilst leaving a gap in the doorway, through which members of staff could speak to him. The dates and periods of confinement (where known) are set out below:

i. 14 December 2008. The School record states that the door was held with a towel for *"some minutes."*

ii. 23 March 2009. The time period was not specified.

iii. 15 May 2009**.** FXS was kept in his room from around 5.15pm until 10pm (approximately 4 hours 45 mins). The record refers to the *"need" "to hold his door to with a towel wrapped around the handle inside"* which *"continued up until 10pm after which he gradually settled to sleep."*

iv. 4 June 2009. FXS was kept in his room for at least three minutes.

v. 5 June 2009. FXS was kept in his room for 20 minutes.

vi. 8 June 2009. The time period was not specified.

vii. 8 June 2009. The time period was not specified.

viii. 11 June 2009. FXS was kept in his room for 15 minutes.

ix. 12 June 2009. The time period was not specified.

x. 12 June 2009. FXS was kept in his room for five minutes.

xi. 16 June 2009**.** The time period was not specified but "*eventually*" he calmed down.

xii. 21 June 2009. The time period was not specified but two members of staff swapped in and out of holding the towel three times.

xiii. 16 September 2009**.** The time period was not specified. The record indicates a duration of five minutes for the incident, but it is not clear if this relates to the earlier physical restraint.

xiv. 17 September 2009**.** FXS was kept in his room for five minutes.

28. There is no evidence that the purpose of confining FXS to his room was ever discussed with him in advance, and contrary to the statutory guidance, it was never discussed with his parents as part of a planned strategy. To the extent that it is suggested that FXS would have been in his room in any event, that is not supported by the evidence. On each occasion FXS was initially at liberty but was then confined in his room; the door was used as a barrier to physically prevent him from leaving. Therefore, he would have experienced an "*initial shock*". Sometimes FXS was detained for a relatively short period and on one occasion it was for a very long period.

29. The towel in the door enabled members of staff to speak to FXS. Ms Day stated in her witness statement that the towel method *"enabled the staff to put some distance between them and* [FXS] *when he was attacking them."* When FXS stopped attacking and moved away from the door it would be opened. However, there was no evidence to suggest that FXS was behaving violently *"during all periods of towel usage…."* The records for 12 June 2009 state that when FXS was confined to his room he was *"crashing about…and pulling on the door".* This behaviour could be connected to his emotional and behavioural issues, but it could equally have been a response to being confined to his room. What is clear is that FXS was confined to his room when his behaviour was disruptive, but he was not behaving violently throughout on all occasions. For example, on 15 May 2009, there is no reference to any violent behaviour either before or whilst being confined to his room. On 8 June 2009, there is no reference to violent behaviour whilst the towel method was being utilised. However, even if the towel method constituted *"short interludes in the context of lengthy episodes of disruptive behaviour,"* I am satisfied that there is no good reason why that should go to reduce the damages.

30. In my judgment, it is reasonable to infer that FXS was encouraged to calm down by members of staff whilst detained in his room. However, the confinement, in and of itself, would have been distressing. The record from 21 June 2009 indicates that, in response to the towel method, FXS pushed things from his bedroom up against the room and then moved them back again. In any event, I accept the submission made by Ms Walker, that FXS is not required to prove that he was more distressed at being falsely imprisoned, than by being lawfully restrained, in order for the false imprisonment to sound in substantial damages. FXS would have been less

distressed had the School complied with its duties. I accept that the School was doing its best to keep FXS and others safe from harm but confining him to his room was unlawful.

31. Ms Foster referred to the case of *R. (on the application of NAB v Secretary of State for the Home Department)* [2011] EWHC 1191 (Admin) which related to a claimant who refused to comply with a requirement to sign documents to facilitate his deportation. I did not find this case helpful. At all times FXS's disruptive behaviour was due to his special educational needs and/or disabilities. I reject the suggestion that his behavioural difficulties are relevant for the purposes of the assessment of damages; it implies that the humiliation of a child is somehow less serious if he exhibits significant challenging behaviour.

Basic Damages

32. In determining the quantum of basic damages, I have taken into account the features referred to above. For the period of false imprisonment on 15 May 2009 (which lasted for nearly 5 hours) FXS is awarded **£2,000**. Doing the best I can, I award the sum of **£300** for each of the other periods of false imprisonments. The sum for the shorter periods of unlawful imprisonment reflects the fact that: (i) on six occasions FXS was confined to his room for up to 20 minutes; the majority were (or could be inferred to be) towards the lower end of that time period; and (ii) although on the other seven occasions the time periods are unknown, it is unlikely that FXS was confined to his room for up to one hour; it is likely that the time period was somewhere between a few minutes and no more than 30 minutes.

Aggravated Damages

33. There was no evidence that the School sought any advice at any stage between 14 December 2008 and 17 September 2009. The School continued to use the towel method even after JLM raised objections in an email dated 8 September 2009. In that email, JLM referred to FXS being "*forcibly detained*" and that this was contrary to legislation. The practice also continued after the social worker stated on 14 September 2024 that she was "*not happy*" with the towel method.

34. In these circumstances, I award aggravated damages in the sum of **£3,000**.

Summary

35. In summary the award for damages is as follows:

Battery:	
Basic damages	£6,000
Aggravated damages	£4,000
False Imprisonment	

Basic damages	£5,900
Aggravated damages	£3,000
Total Damages	**£18,900**

Costs

Submissions

36. Ms Walker submitted that FXS is the successful party. She invited the Court to exercise its discretion to order the School to pay his reasonable costs on an indemnity basis. In support of this submission Ms Walker pointed to the School's repeated attempts to procure the discharge of FXS's legal aid certificate. In particular, in January 2022, the School's solicitor suggested (to the LAA) that FXS's solicitors had provided the LAA with information which contradicted assertions (with regard to the expert evidence of Dr Rippon) that had been made at a case management hearing in June 2021. Ms Walker submitted that the School's solicitor had not attended the case management hearing, and in any event, contradictory assertions had not been made.

37. Ms Foster submitted that FXS should not have the benefit of an order for costs. Alternatively, FXS should be awarded costs in respect of the issues upon which he succeeded, and the School should be awarded costs in respect of the issues upon which it succeeded. Furthermore, the appropriate way in which to achieve this objective would be to apply a percentage reduction in both cases. This would properly reflect (amongst other things) the fact that FXS did not succeed on any issue that required expert evidence.

Basis of Costs

38. There is no dispute as to the applicable principles. In short, in accordance with the general rule (see Civil Procedure Rule 44.2) the unsuccessful party will be ordered to pay the costs of the successful party having taken into account all matters, including whether a party has been partially successful and conduct both before and during the proceedings. As stated in *Bank of Credit and Commerce International SA v Ali (no 3) [1999], NLJ 1734, Vol. 149, "For the purposes of the CPR success is not a technical term but a result in real life, and the question as to who has succeeded is a matter for the exercise of common sense."*

39. FXS is the successful party. The updated schedule of loss and damage dated 12 December 2022, claimed special damages in the sum of £32,776 plus £140,000 for pain and suffering, making a total of £172,776. The School could have made an offer, even a modest offer. It did not. Therefore, for FXS to recover any compensation the matter had to proceed to trial.

40. The claim in negligence did not succeed, but I am satisfied that it would not be appropriate to limit the recovery of costs or make an issues-based costs order. In reaching this conclusion I note that the face down restraints and use of the towel method were central to this case and took up the vast majority of court time. Furthermore, all three heads of claim were intrinsically linked. To separate the issues, at this stage of the proceedings, would be a hollow exercise given

that in relation to the negligence claim, the evidence from the factual and expert witnesses provided helpful context and was extensively relied upon by both parties. This included evidence with regard to the strategies deployed by the School to manage FXS's challenging behaviour, the training and experience of the staff and the ethos of the School. In these circumstances, I see no good reason to depart from the general rule.

41. The plain fact is that the School fought hard, successfully defended the weakest elements of the claim, but ultimately lost.

42. Should the costs be on the standard basis or the indemnity basis? The critical requirement for an indemnity order is some conduct or some circumstance which takes the case "*out of the norm*" (see *Excelsior Commercial and Industrial Holdings Ltd* [2002] EWCA Civ 87t §31 and §39) or "*something outside the ordinary and reasonable conduct of proceedings*" (see *Esure Services Ltd v Quarcoo* [2009] EWCA Civ 595.

43. I can deal with this matter briefly.

44. Ms Walker primarily relied on the School's application to discharge the legal aid certificate. I am not persuaded that the representations made to the LAA justifies costs on the indemnity basis. I accept that it is entirely legitimate for a party to make representations to the LAA if it considers that such action is appropriate. Without more, I concluded that the conduct of the School's legal representative (presumably on instructions) does not meet the threshold for an award of costs on the indemnity basis. In my judgment it would be unjust and disproportionate to order the School to pay indemnity costs in this case.

45. For all these reasons, I order that the School pay FXS's costs of the claim, on the standard basis subject to detailed assessment, if not agreed.

Cost Budgets

46. Ms Walker invited the Court to approve the most recent costs budgets. Ms Foster objected to this course. She submitted that the correct procedure is for the additional costs to be considered in the context of a detailed assessment.

47. Both parties had provided updated costs budgets in light of the unforeseen additional trial days. In accordance with CPR 3.15A I am satisfied that it is appropriate to approve the costs budgets. The assessment of those additional costs is to be deferred to the process of detailed assessment (to be dealt with at the same time as the remainder of the assessment of costs), if costs are not agreed.

Conclusion

48. I am grateful to counsel and those that instructed them for the hard work which evidently went into the preparation of this case for trial.

49. The parties should seek to agree terms of an Order that reflects my decision on quantum and costs.