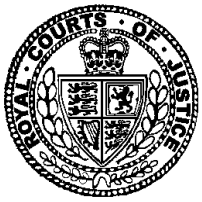

Neutral Citation Number: [2023] EWHC 417 (KB)

Case No: QB-2020-002740

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 February 2023

Before:

MATTHEW BUTT KC
(sitting as a Deputy Judge of the High Court)

- -

Between:

SS **A protected party acting through her litigation friend the Official Solicitor**	**Claimant**
- and –	
ESSEX COUNTY COUNCIL	**Defendant/Part 20 Claimant**
-and-	
(1) FF **(2) FM**	

- -
- -

Mr Steven Ford KC (instructed by **Browne Jacobson Solicitors**) for the **Defendant / Part 20 Claimant**

Hearing dates: 17th to 19th January 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 28 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MATTHEW BUTT KC

Matthew Butt KC:

I. INTRODUCTION

1. This trial concerns a Part 20 claim brought by Essex County Council (ECC) against the Part 20 Defendants "FF" and "FM" who between 1981 and 1998 were the foster parents of "SS" and later her carers until she was removed from their home in 2009. ECC seeks an indemnity or alternatively a contribution from FF and FM for compensation it paid to SS in the principal claim. Within that principal claim, SS alleged that she had been physically and sexually abused, starved, neglected and falsely imprisoned by FF and FM. ECC admitted both negligence and vicarious liability in the principal claim and on 18/10/22, the court approved a settlement in favour of SS in the sum of £325,000. ECC having paid that sum to SS submits that FF and FM are responsible for "the same damage" and thus liable under the Civil Liability (Contribution) Act 1978 (the 1978 Act).

II. THE PRINCIPAL CLAIMANT (SS)

2. SS has been granted anonymity to protect her Article 8 rights and is referred to as SS in her claim and for the purposes of this judgment. As the identity of SS would be obvious to anyone who knew her former foster carers if they were named, I have referred to the part 20 Defendants as the Foster Father (FF) and Foster Mother (FM) for the purposes of this judgment.

3. At all relevant times SS lived within the geographical boundaries of ECC where she resides at the date of this judgment. Having been removed from her parents, ECC assumed parental responsibility for SS when she was a child and its responsibility continued throughout her adult life as a vulnerable adult who was incapable of caring for herself.

4. It is clear that SS had very significant needs from birth including severe learning difficulties and autism. SS has and will always need help with basic tasks such as cooking, eating, washing and all other everyday activities. She is incapable of much intelligible speech and will sometimes repeat words and phrases she has heard from others without any apparent understanding of their meaning (known as echolalia). SS's reported echolalic utterances are of significance in this trial.

5. It would never have been possible for SS to have provided a witness statement or to give oral evidence, whatever accommodation the court might have been able to provide.

6. SS was placed into the foster care of FF and FM on 24/06/81 shortly after removal from her birth parents. After turning 18, she remained with FF and FM until an unconnected police visit on 14/05/09 resulted in her being removed from the FF/FM family home and placed within a residential home in Essex. She resides in a similar residential home to this day. SS was removed from FF and FM's care due to police and social service concerns as to what officers saw within the home. The police believed that SS was falsely imprisoned and had been abused. FF and FM were arrested by the police, but no further action was taken in relation to the criminal allegations.

III. THE PRINCIPAL CLAIM BETWEEN SS AND ECC

7. ECC admitted liability in open correspondence on 27/01/14 (on the basis of its own negligence) and requested that the claimant make proposals in relation to causation and quantum.

8. After ECC admitted liability, the Supreme Court gave judgment in *Armes v Nottinghamshire County Council* [2017] UKSC 60. The effect of the judgment in *Armes* is that a local authority

in ECC's position can be vicariously liable for abuse by foster parents whether they were negligent in the monitoring of that foster placement or not.

9. SS's particulars of claim plead (a) sexual assault, (b) physical assault, (c) false imprisonment, (d) torture and starvation and (e) chronic neglect. The claim refers to that damage as having been caused "during the foster placement" or "at the foster home" albeit that the damage is alleged to have occurred between 1981 and 2009 (the period SS was with FF and FM, not the duration of the foster arrangement which ended in 1998 at the latest). ECC is said to be liable both in negligence for failing to prevent the damage and on the basis of vicarious liability. The vicarious liability must have ended in 1998 at the latest when FF and FM were de-registered as foster parents by ECC (see below).

10. SS claimed damages from ECC in the sum of £6,380,600.52. This was later raised to £7,407,999.49.

11. By way of a counter schedule, ECC responded:

> "D's case on quantum is that C is entitled to an award of general damages for pain, suffering and loss of amenity to compensate her for whatever physical mistreatment, abuse and neglect she suffered as a result of the tortious conduct of [FF and FM] but that conduct has made no identifiable, discernible or quantifiable difference to C's need for accommodation, care and assistance (including transport and aids and equipment), case management or treatment.
>
> …
>
> D accepts that the court is likely to find that [SS] sustained at least significant emotional abuse and neglect whilst placed with [FF and FM], as evidence [sic] (not least) by her physical condition upon removal in May 2009. D also accepts that the duration of time over which such abuse was suffered by C justifies an award of general damages towards the top of the "severe" bracket of general damages for psychiatric and psychological damage caused by physical and/or sexual abuse in the 16th edition of the Judicial College Guidelines. An appropriate award of damages is £100,000."

12. ECC's alternative position (if the court did not accept ECC's evidence on causation) was that care costs should be restricted to 8 hours per week (said to amount to £91,538.54) and case management costs (said to amount to £78,792.56).

13. Terms of settlement were agreed between SS and ECC. This required the approval of the court as SS is a protected person. HHJ Lickley KC duly approved the settlement on 18/10/22. The terms of the settlement were that the Claimant may accept the sum of £325,000 inclusive of interest in full and final settlement of the claim. Costs were also

ordered to be paid to SS on the standard basis, to be assessed. An interim payment of £200,000 has been made by ECC towards payment of costs.

14. It is the sum of the two figures above (£525,000) that ECC seeks from FF and FM by way of an indemnity. In the alternative ECC seeks a contribution towards this sum from FF and FM.

IV. THE PART 20 CLAIM

15. ECC issued a claim joining the foster parents as Part 20 Defendants on 08/01/21 claiming that FF and FM were responsible for the damage for which ECC had admitted liability.

16. FF and FM have represented themselves throughout these proceedings. They served handwritten documents which have been accepted as their defence and witness statements. They both deny that there was any abuse or neglect of SS. They say that this was "a good placement."

17. Part 20 Claims are brought under the Civil Liability Contribution Act 1978. Under section 1 (1) of the 1978 Act (see below), a claim lies against FF and FM if they are "liable in respect of the same damage" as SS claimed against ECC.

18. The particulars of the Part 20 claim served by ECC refer to the damage in SS's claim as set out above. These particulars allege:

> "insofar as the claimant may prove that she suffered personal injury alleged in the particulars of claim…that injury was caused by you in that you:
>
> Committed acts of trespass to the claimant in the form of assault, battery and/or false imprisonment and/or
>
> Negligently caused harm to the claimant and/or
>
> Negligently failed to protect the claimant from harm caused by others"

19. By way of skeleton argument served shortly before this trial began, ECC submitted that:

    (i) it would not seek a finding in relation to alleged sexual abuse of SS by FF and FM,

    (ii) its case was that FF and FM subjected SS to assaults, false imprisonment, chronic starvation and neglect,

    (iii) its case would broadly mirror the case advanced by SS against ECC as set out in her "schedule of abusive and neglectful experiences"

    (iv) the focus of ECC's case would be the condition in which SS was found when the police entered the house on 14/05/09.

20. I note that SS's "schedule of abusive and neglectful experiences" alleges far more against FF and FM than the matters ECC stated it would prove within its skeleton argument. I also note that the schedule served by SS alleges sexual and physical abuse over many years.

21. ECC's position became more focused by the time closing submissions were made. The findings I was asked to make by Mr Ford KC (who represents ECC) were:

(1) SS was deprived of adequate and or reasonably nutritious food for up to three years prior to her removal by the police;

(2) food deprivation probably began rather earlier;

(3) SS suffered significant emotional abuse and neglect.

My note of Mr Ford's closing submission in relation to (3) is:

> "SS was very seriously neglected having been kept in truly appalling conditions which included a filthy house that smelt of urine due to her being required to use a chemical toilet. She was confined to two small rooms at the back of the house behind a screen that she would not have been able to open. These were the conditions that she was said to have been kept in during the night, for half of her waking hours and when FF and FM were not in the house. The arrangement appears to have been in place for over 10 years (though ECC accepts that the circumstances were not in their 2009 state in 2003)."

22. In terms of emotional abuse Mr Ford relies primarily upon the echolalia and submits that although this does not of itself prove assaults, it is evidence of threats and emotional abuse from FF and FM to SS.

23. Mr Ford also relies upon evidence that SS was very rarely taken to the doctor despite her needs and frequent absences from school.

24. It is notable that at the close of evidence, ECC no longer sought a finding that SS was physically assaulted by FF and/or FM nor that the tort of false imprisonment was made out, the latter point was not conceded but it was said to be part and parcel of the neglect advanced at paragraph 21 (3) above.

V. THE LEGAL FRAMEWORK

25. Sections 1 and 6 of the 1978 Act provide:

> "**1 Entitlement to contribution**.
>
> (1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).
>
> (2) A person shall be entitled to recover contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought.
>
> (3) A person shall be liable to make contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based.

(4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established."

6.— Interpretation.

(1) A person is liable in respect of any damage for the purposes of this Act if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise)"

26. As to how liability is established against FF and FM, Mr Ford initially submitted that in this case, the effect of section 1 (4) of the 1978 Act was that once ECC had entered into a bona fide settlement with SS for damage said to have been caused by FF and FM's conduct, liability against FF and FM was proved without more.

27. In support of this submission, Mr Ford relied upon both the wording of section 1 (4) of the 1978 Act; this court's judgment in *WH Newson Holding Limited v IMI Plc & Delta Limited* [2016] EWCA Civ 773 and the more recent Court of Appeal judgment in *Percy v White & Anor* [2021] EWHC 22 (Ch). Mr Ford argued that whilst liability will not be proved by a settlement in every case, on the instant facts, where ECC's liability is (i) vicarious and (ii) based on negligence in allowing and/or failing to prevent tortious acts by FF and FM, it is axiomatic that the settlement proves their (the foster parent's) liability.

28. Mr Ford argued that it would not therefore be necessary for the court to be satisfied of anything more than that the settlement between SS and ECC was bona fide. I indicated my provisional view that this was not a correct interpretation of *Percy* and Mr Ford having reflected on the position did not maintain this submission on day two of the trial. It is thus not necessary for me to rule on this point, however, I do not consider that ECC's settlement proves liability in respect of FF and FM in this case for the reasons that the Court of Appeal clearly explained in *Percy*. FF and FM cannot, however, challenge ECC's liability to SS in this case *per Newson* and *Percy*.

29. Mr Ford accepted therefore that ECC must prove FF and FM's liability for the same damage. Doing so in this case is not easy for a number of reasons:

i. The trial bundle was never agreed. In correspondence between the parties, ECC asked FF and FM if the 831 page trial bundle was agreed. There was no substantive response from FF and FM. I have accepted Mr Ford's submission that the contents are nonetheless admissible in this trial. It cannot be right that FF and FM could exclude all the evidence simply by failing to respond to these letters.

ii. Whilst the contents of the trial bundle are admissible, no hearsay notices have been served in these proceedings. When I discussed the status of the trial bundle and the lack of any hearsay notices with Mr Ford during his opening, he indicated that ECC's position was that the contents of the trial bundle were admissible but not as to proof of the truth of their contents. This position appeared to shift during his closing submission. I indicated my view that absent clarity as to what was relied upon as hearsay evidence and given ECC's contrary position before evidence was

called, I did not consider it fair for ECC to now resile from that position. Mr Ford did not disagree with this.

The hearing would have taken a different course if certain documents were to be relied upon as hearsay evidence, not least of all because I would have taken FF and FM to these documents in evidence.

iii. There has been no real engagement by FF and FM in case management. There has also not been any case management or directions issued specific to this Part 20 trial. All of the directions appear to have been with the quantum trial between ECC and SS in mind. The quantum trial of course did not take place as the matter settled. ECC then asked that the listing be used to resolve this Part 20 claim.

One consequence of the above is that there are reports from four psychiatrists in the bundle which adopt polarised positions. This can be vividly demonstrated by comparing the conclusions of Dr Andrews (instructed by SS) with those of Professor Maden (instructed by ECC).

Dr Andrews purports to diagnose PTSD and concludes that significant damage has been caused to SS by starvation and physical and emotional abuse. Dr Andrews also states it is more than likely that SS was sexually abused. In his supplementary report, Dr Andrews states that since 1984 (age 8) SS has "suffered multiple abuse such as physical, sexual and emotional abuse alongside emotional neglect and starvation." It is not clear to me how Dr Andrews comes to these conclusions. He goes on to state that as a direct result of this, SS has suffered severe post-traumatic stress disorder (PTSD).

Professor Maden concludes that SS does not have PTSD and that the vast majority of SS's problems are constitutional in origin and that any lasting impact of the material events would at most make only a small contribution to her current problems. Professor Maden does not purport to be able to conclude that SS suffered any abusive experiences beyond neglect and is critical of attempts by others to do so based on interviews with SS.

Master Sullivan issued directions on expert evidence by her order dated 06/05/21. These directions amongst other matters granted permission for SS to rely on the evidence of Dr Andrews and for ECC to rely on a psychiatric expert (to be served). Master Sullivan also directed that unless the reports were agreed, there had to be a without prejudice discussion by Friday 15/04/22 with a statement of areas of agreement and disagreement sent to the parties by 22/04/22. Permission was granted to call oral evidence of these experts on matters remaining in issue.

At a further case management conference on 7/07/22, the date for ECC to serve expert evidence was extended to 12/08/22.

I assume that because settlement was underway between SS and ECC by August 2022, there was never a joint report produced by the psychiatrists. No party in this Part 20 trial has asked for any of the expert witnesses to attend to give oral evidence.

When I asked how I was to resolve the disputes between psychiatric experts, Mr Ford said that he placed limited reliance upon the psychiatric evidence. He said that the only expert evidence that he would take FF and FM to in questioning was the joint report of the gastroenterologists. Neither party took me to any of the psychiatric material during evidence or in opening or closing submissions

iv. More generally, there is a paucity of evidence within the trial bundle especially given the very serious allegations made against FF and FM in the pleadings. I make clear that even the more focused findings which ECC ultimately sought against FF and FM in closing are serious amounting as they do to allegations of grave mistreatment of SS over the course of many years.

v. ECC managed standard disclosure by sharing what Mr Ford described as the voluminous records held by ECC with FF and FM electronically. I was told that they had accessed this material but FF said that he was not able to do so.

I asked Mr Ford whether I could be confident that any material which would contradict matters put by ECC to FF and FM in cross examination had been provided to me. Mr Ford was not able to do so. He said that ECC was not obliged to sift the material and place documents adverse to ECC's case within the trial bundle. I agree that there is no such obligation upon ECC, however, it must be borne in mind that FF and FM are comparatively elderly litigants in person (aged 71 and 72 at the time of trial) facing serious allegations. It was clear that they had limited IT skills and found the litigation process confusing.

I have had to come to conclusions upon the evidence provided to me without speculating as to what (if anything) missing material might show. I was however concerned that an important document from 2003 was not contained in the trial bundle and only came to light by chance very late in proceedings (see below).

The various expert reports contain extracts from various other reports and records which I have not seen, some of which are supportive of the case advanced by FF and FM.

30. Some of the matters above are the result of FF and FM being unrepresented in these proceedings. I note that ECC repeatedly urged FF and FM to seek legal representation in correspondence.

VI. THE EVIDENCE

31. Mr Ford submitted that he intended to prove his case primarily by putting documents in the trial bundle to FF and FM. He accepted that where such matters were not accepted by the Part 20 Defendants, the oral evidence of FF and FM was likely to be preferred. I took this to mean that ECC would not be able to "gainsay" evidence from FF and FM merely by reference to documents in the bundle which were not admissible as to the truth of their contents. Obviously this would not apply where oral evidence is inherently implausible or contradicted by other evidence in the case. I have taken a careful approach to the evidence and in particular where serious allegations are made against FF and FM. I have considered what weight I ought to give to all of the material I have read and heard before coming to my factual findings.

32. Mr Ford invited me to focus upon the condition SS was in when she was removed from the home in May 2009, and the joint statement of the gastroenterologists. I have done so.

33. I have read and considered the entirety of the trial bundle. This includes the witness statements and defence served by FF and FM. I have given careful consideration to all of the various records, expert reports and witness statements served by ECC (whether prepared for these proceedings or for the earlier criminal investigation) and the Part 20 Defence documents.

(a) Witnesses from the care home

34. No witnesses gave oral evidence for ECC. Three statements were served from staff at the residential unit where SS now resides. Two of these were agreed by FF and FM but a third was not. I have been invited by ECC therefore to focus upon the evidence of the two agreed witnesses.

35. The statement which was not agreed was that of the residential manager of the home SS moved to in May 2009. She describes how SS was extremely thin and hungry when she arrived at the residential home. Her clothes and body were dirty and she was unwashed and smelt of urine and body odour. She had head lice and suspected pubic lice. There is little within this statement which appears to be in serious dispute aside from the suggestion that SS had pubic lice which ECC do not rely upon as an indication of sexual abuse.

36. The two agreed witnesses work at the home SS moved into in 2013. They describe in their written statements how SS presents within the residential home and her day to day needs. They outline her echolalia and the use of phrases such as "dirty girl". At times SS becomes agitated and will move furniture, slam doors and "trash her bedroom" but this is said to be less of an issue now. In terms of keeping SS safe, it is said that she has no danger awareness. For example she will put her hand in a hot stove or approach members of the public. SS needs help with dressing, washing, brushing her teeth, using the toilet and cleaning herself afterwards. She is said to be very focused on food and drink but this has improved over the years and now if she feels full, she will not continue to eat. SS will leave the home accompanied by staff to go on trips and walk along the seafront. She enjoys sensory play, jumping and dancing.

(b) The gastroenterological evidence

37. I have been assisted by a very clear joint statement from Professor Malia and Dr Wainwright (the gastroenterologists instructed by SS and ECC respectively). Neither examined SS. Their opinions are based upon medical and other records which they examined. In summary they conclude as follows:

    i. At the at the time of her removal from FF and FM's home, SS appeared severely malnourished with evidence of muscle wasting and lower limb oedema (a build up of fluid which causes swelling);
    ii. SS would not have been menstruating normally at the time of her removal and therefore her iron deficiency must have been caused by inadequate nutrition;
    iii. SS was well into the underweight range from records at the time she was 14 (albeit based on a single measurement during puberty);
    iv. SS was not undernourished when she was 21;
    v. a note from a Dr Khine in November 1999 did not raise any concern of malnourishment;
    vi. as SS was menstruating in 2006 she was not underweight at this time (as loss of normal menstruation is universally present at low body mass);
    vii. the period of significant malnutrition occurred latterly during SS's stay with FF and FM at some time after July 2006 and prior to May 2009;
    viii. the malnutrition was unlikely to have caused SS's shorter stature;
    ix. SS's persistently underactive thyroid was not related to malnutrition;
    x. there would be negligible effects of the alleged neglect and malnutrition on SS's long term health and it would not add to the effects of her underlying autistic spectrum disorder.

38. As set out below, FF and FM did not accept the central conclusions of the gastroenterologists but neither did they request permission for either or both to give oral evidence. I note that ECC specifically raised the question of these experts attending with FF and FM by way of an (undated) letter sent on a date before 20/10/2022.

(c) Condition of SS in May 2009

39. The appearance of SS upon removal from the house is described by the various police officers and social workers who attended the address on 14/05/09. She is described by police officers as being emaciated and looking like a 12 year old boy. It is agreed that SS was wearing dirty clothes and no underwear when she was removed and that her room (and to some extent the house) smelled of urine. It was also agreed that she had head lice and that her body had not been washed for some time. It is relevant to note that FM had been suffering from gastroenteritis for two weeks before the police visit and that SS had been unwell with the same condition for around one week. FF and FM relied upon the illness in the family as being a partial explanation for the condition of the house and SS at the time the police arrived.

(d) Condition of the family home

40. As to the conditions in the family home in 2009 and earlier, I have carefully examined such records as have been provided in the trial bundle. FF and FM were cross-examined upon some of these. There was disagreement as to the conditions in the home, whether these were generally acceptable standards and, whether, for example, the level of dirt and disorder evident provided an acceptable environment for SS to live in. FF and FM preferred adjectives such as untidy to dirty or filthy. There was also a disagreement over how strong the admitted smell of urine was within the house.

(e) SS's section of the house

41. As to SS's living quarters, it is agreed that she had two rooms on the first floor at the back of the house. One room is described as a day room and one as a bedroom. There was a sofa in the former and a bed in the latter. It is agreed that to enter SS's rooms, one would need to move through extensive clutter (which was also present throughout the rest of the house). It is also agreed that a makeshift screen/barrier was placed to separate SS's rooms from the rest of the property. This had a trellis added to it at the top, which did not quite reach the ceiling. The screen could be secured by way of a hook which FM would tie with a piece of string using a "special knot" at times when SS needed to be kept within her area. The screen and corridor had fairy lights running along the side. It was agreed that SS would have been physically capable of pushing the screen down or to one side but that she would not have known how to do so. Her movements beyond this area were thus restricted. How long SS would spend within these two rooms is a matter I have had to determine on the evidence (see below).

42. SS did not have access to a conventional toilet within her rooms. Instead a chemical toilet was provided which she would use at night and when she was otherwise within her rooms. FF and FM's explanations for this set up are described below.

(f) Echolalia

43. It was not disputed that SS had echolalic outbursts before, during and after her time with FF and FM. These included the phrase "no dinner for [SS]" reported in 1993 and SS appearing to chide herself and repeating apparent threats of violence on other occasions. Professor Maden records the phrases SS uses within the residential homes she moved to in 2009. More frequent phrases are "Don't look at me like that", "Stop it", "I've told you to stop" and "get

out". Phrases used less often were "lying bitch", "bloody nuisance", and "dirty girl". This evidence is disturbing and indeed heart-breaking. It was agreed that these are phrases SS would not understand and that she must have been repeating things that she had heard. The question was whether these were threats and abuse directed at her from FF and FM or if she had heard them from others.

(g) Records from ECC

44. As set out above, there are surprisingly few records provided within the trial bundle. Those which have been provided are heavily redacted and at times incomplete with missing pages. It became clear over the course of the trial that there are other relevant records which I have not seen, some of which are referenced within the expert reports.

45. Medical notes for SS before her removal from the FF/FM home are sparse. A note is recorded from Dr Tabbone, the family GP after her removal in May 2009 stating that she would not be able to provide any information [to ECC] as "I have barely seen the patient for years if ever".

46. I could find only seven entries within the GP notes relating to SS during her 28 years with FF and FM. As noted below FM and FF said that SS was seen by another doctor who would visit her school. This is supported by entries within Professor Maden's report which detail annual reports from a Dr Banyard who between 1986 and 1994 states that SS's general health is good. In 1990 Dr Banyard states that SS "always has excellent physical health".

47. I have seen medical notes which post-date SS's removal from the FF/FM family home. These end on 26/05/15 and document the medication SS has been prescribed and various minor ailments she suffered between 2009 and 2015. The notes also provide some detail in relation to SS's learning difficulties and behaviour within the residential home, including that SS would (in March 2015) "steal food and constantly want to eat".

48. In terms of other records created and/or held by ECC, I have seen only a small part of the voluminous material disclosed by the Defendant / Part 20 Claimant.

49. Documents have been served detailing suspected non accidental injuries to SS noted at school between 1989 and 1994. There is also a report on SS written by an unidentified acting head teacher which expresses concern about the presentation of SS at school between 1983 and 1994. The letter details her anxiety, echolalia, level of personal care, apparent injuries (as set out in the schedule) and subsequent withdrawal from school.

50. It is not clear who has created the schedule of injuries. Whilst there is very little detail, the injuries appear to be mostly minor. For some it is impossible to tell what is actually being described. I have not been able to come to any findings in relation to these injuries. This evidence is insufficient of itself to prove that SS was assaulted by FF and FM in the 1990s. I note that SS had no bruises or other injuries when examined in 2009.

51. Professor Maden has reviewed "disabled person's assessment of need" records for SS from 1995 and 1997. None of these documents were in the trial bundle. In relation to the 1997 assessment, I note that 11 home visits were successfully carried out.

52. Also provided are notes of a strategy meeting concerning a child (whose name is redacted) and SS held on 06/01/98. These notes describe concerns about FM's drinking and standards at home more generally. There is reference to ECC proposing to take legal advice regarding SS stating that "she is an adult and there is no legislation to protect her".

53. I have also considered a very heavily redacted series of documents dealing with the removal of a different foster child (referred to as Child A in this judgment) from the care of FF and FM in 1998. It is clear that in 1998 an investigation was opened under section 47 of the Children Act 1989 into Child A. The documents pertaining to this are again heavily redacted. Concerns about FF and FM are set out in this document which are relevant to the care of SS. The investigation notes the injuries to SS referenced above, echolalia, SS having been found wandering in the road in 1984, presenting at school unwashed in 1992 and 1994 and her social worker finding it hard to access the home in 1992. A social worker handover report from 1996 is also referenced which notes that SS has "changed from an uninhibited active and energetic girl to a quiet, contained, stooped and possibly wary young woman." A further note from 1998 observes that SS "rarely sees the GP on a regular basis although she does not appear to have many ailments". The house is noted to be "chaotic and dirty".

54. A further document is entitled "summary of concerns arising from S.47 investigation related to their [FF and FM's] care of children and vulnerable adults". This document contains anonymised reports of physical punishment of children though none relate to SS. One 1998 entry states "he [presumably FF] never hits [SS]". A report from 1998 notes improvements in [presumably SS's] abilities in terms of eating, mobility and communication which are said to be much stronger. There are reports of the house being a mess in 1998 with "no family atmosphere" and the bedroom "smelling slightly of urine" in 1982. Other entries repeat similar themes to those set out above but are very hard to interpret due to the extent of the redactions applied to the document.

55. There are notes of a meeting held regarding FF and FM on 23/07/98 at two different parts of the trial bundle. Pages are missing from these and the document is again redacted. The most complete record refers to a meeting at which multiple agencies are present including SS's social worker. The meeting records concern for SS (now an adult) as she receives no external services and her social worker is not allowed contact without FF and FM being present. The minutes state that a guardianship order is being considered for SS and she will have a psychiatric assessment as part of that process. A majority decision is made at the meeting to refer the case for organised abuse procedures (with the police disagreeing). The chair of the meeting acknowledges that there have been "long standing concerns which were not challenged." A decision is made to refer the case to the ECPC (presumably Essex Child Protection Committee).

56. A further document is entitled "Initial Report into the Circumstances Leading to the Removal of a Child from the Care of Essex County Council Foster Carers". This document is dated September 1998 and is signed by a Jacki Rothwell. The document is heavily redacted. It notes that the author has found that the files are "littered with information that gives rise to concern about the quality of care they [FF and FM] are providing to children." The report raises numerous allegations against FF and FM most of which are impossible to interpret due to the redactions within the document. Very few of these were explored in evidence with FF and FM.

57. It seems that FF and FM were de-registered as foster parents by ECC at the conclusion of the section 47 investigation and Child A was removed from their care in 1998.

58. Whilst there are no records from beyond 1998 in the bundle, some later material can be found referenced within the expert reports.

59. Dr Woodward includes an extract from a clinical psychological report dated 14/10/99 (which I have not seen). It seems likely this was commissioned as a result of the section 47 investigation and deregistration of FF and FM as foster carers. This extract provides:

> "SS has two rooms to herself in the Victorian property where she lives. These are situated on the first floor consisting of a bedroom and a sitting room as well as having access to the rest of the house during the day. At night, SS is restricted to her own rooms and has her own 'camping toilet' for use at night and to constrain her from wandering the house unsupervised at night."

60. The same psychological report is referenced within other expert reports (though confusingly bearing slightly different dates) including that of Dr Murphy who records the report's conclusion as being that SS is "functioning within the range compatible with individuals who have a severe learning disability".

61. Also in Dr Woodward's report is an extract from a letter from Dr Khine who would seem to be a psychiatrist who examined SS in 1999 pursuant to the proposed guardianship application. The letter was sent to SS's GP on 11/11/99 and provides:

> "Perhaps I may be wrong, but there is no evidence at this stage of my involvement to indicate that SS is in grave danger by continuing to be in the [FF/FM] household. She did not appear to be in distress, there was no evidence of overt neglect, and SS appeared happy within herself."

62. It seems that Dr Khine's conclusion summarised above caused ECC to decide that a guardianship order would not be justified in SS's case.

63. At the end of the evidence and before he made his closing submission, FF asked whether I had seen a document produced by ECC in 2003. The covering letter to this document is within the trial bundle but not the underlying material. I do not know why this material was missing from the trial bundle. It was agreed that I could see and consider this document which I inspected briefly at court and a copy was subsequently provided to me by ECC.

64. The covering letter is dated 10/09/03 and states that:

> "[SS] is no longer under a care order and not accessing any help from social services…however under government guidelines social services still have a duty to care and will be required to review [SS's] care periodically."

65. Enclosed with the letter is a "community care review form" completed by a social worker named Pam Adams. The review date is 20/05/03 (shortly before SS's 27th birthday). The "consumer [SS] view" is at page 2. It states that "SS appeared quite well and happy within the household…SS was willing to show me her bedroom and lounge area….SS had some speech but was reluctant to say much."

66. The "carer [FF and FM] view" is set out at page 3. It provides details about SS's health, activities and personal hygiene. Her health is said to be good with only colds and sore throats. The carers state that SS is menstruating normally (which would indicate that she was not malnourished at that time *per* the experts) and that SS's birth mother visited once a month. At page six and within the coordinator's view section, Ms Adams notes that SS is accessing the community college but not mixing with people outside of the family environment. Ms Adams concludes that SS is "a healthy young lady who is continuing to learn skills".

67. A further entry referenced by Dr Woodward dates back to 13/07/06 and is from a social care home visit. The entry states:

> "[SS] continues to be in good health and there does not appear to be any obviously [sic] heath issues / or concern [sic] the smell in SS's bedroom highlighted by a worker on a previous visit would appear to be the smell of cats. SS continues to need help with managing her periods, but is more accepting of the use of pads"

68. Finally, Dr Murphy includes an extract from an Adult Learning Disability Service Review by Mark Heaffey dated 28/06/07, which he summarises thus:

> "During last visit on 30th April 2007 she was cheery, friendly and appeared to be well supported."

(h) Evidence from FF and FM

69. I heard oral evidence from FF and FM. Each confirmed that their handwritten statements were true to the best of their knowledge and belief. I asked both FF and FM a number of supplementary questions in order to understand their evidence and both were cross-examined by Mr Ford. In the case of FF this was a lengthy and skilful cross-examination. Matters were taken rather more shortly with FM as the issues were becoming clearer.

70. FF was 71 at the time of the trial. He had worked in adult care for many years but retired in around 1990. In addition to SS, there were other foster children in the house (including "Child A") as well as various lodgers staying from time to time. He and FM later adopted a boy who is now in his 40s and twins who are now 37. All of these people would at various times have lived with SS. The family moved to their current address in 1983. FF found it very difficult to provide clear dates for when various children joined and left the family.

71. FF's evidence was not always easy to understand. He found giving evidence difficult. This was in no small part due to a tendency on his part to provide long answers which would often stray away from the point. He is also hard of hearing and so it was difficult to gain his attention to keep him focused on the question he was being asked. I found him somewhat suggestible and have had to be careful in what conclusions I draw from his evidence in this regard. I fundamentally found him to be an honest witness. In his closing submission, Mr Ford described the evidence of FF and FM as compelling, though his point was that it was extraordinary that they honestly believed they had done nothing wrong.

72. FF said that he and his wife looked after SS to the best of their ability. He spoke of his experience of working with "handicapped people" and seemed very clear that he knew what was best for SS. The closest that he came to an admission that he did not care properly for SS was stating "we got old."

73. SS originally came to stay with FF and FM in 1981 as an emergency placement. This later became permanent when it became clear that SS could not return to her birth parents. Once an adult, SS remained in the house with FF and FM acting as her carers.

74. FF explained that Child A was in his and FM's foster care until 1998 when he was removed by social services. Following this, he and FM were deregistered by ECC as foster carers. FF said he did not know why he was de-registered but said that after Child A was removed, the family was visited by a doctor, a psychiatrist and social worker. He said that they had no concerns about the set up at his home. ECC did not challenge FF on this.

75. During cross examination, it became apparent that those representing ECC did not know why FF and FM were de-registered as foster parents either. I was told that the records contained in the trial bundle had been redacted in the interests of Child A and whilst ECC must have "corporate knowledge" of the reasons, this information had not been shared with those

representing ECC in this trial. I was not able to reach any conclusions therefore in relation to the 1998 removal and the de-registration of FF and FM as all of the parties said that they did not know why this happened.

76. I gained the impression from FF's evidence that as SS became a young woman, FM was primarily responsible for her care although he would also help out.

77. In terms of living conditions, FF described the rooms and the operation of the screen broadly as summarised above. He explained that the screen was essential to keep SS safe. If SS was not confined to her rooms, she might run out into the street, turn on the oven or play with water in the toilet and would generally be unsafe in the house. I tried to ascertain from FF how much time SS would spend in her rooms with the screen tied. I did not find his evidence easy to follow in this regard. FF appeared to agree when I enquired if it was "50% of her waking hours" but I am not sure how well he understood what he was agreeing to. In hindsight, suggesting a percentage to this witness was not helpful.

78. FF said that if SS was not supervised around food, she would overeat. This does not seem to be in dispute. He said that SS would generally (but not always) eat three meals a day, but it took some time for him to land upon this position. On balance I put this down to his inability to answer questions clearly and simply as opposed to evasiveness or inconsistency.

79. FF agreed that the house was cluttered and untidy describing it as an average untidy middle class house. He agreed some people might have concerns about conditions in the house but could not explain what he meant by this. He agreed that SS's room would smell at times because of the chemical toilet, but the smell would dissipate when it was emptied. He said that the rest of the house generally would not smell. The chemical toilet he said was required because SS could not safely wander the house at night. If SS used the bathroom unsupervised, she would play with the water in the toilet bowl.

80. FF denied that he or FM ever threatened SS, physically or emotionally abused her or used food deprivation as a form of punishment. He said that the echolalic outbursts would typically occur at school where SS would be overstimulated as opposed to at home where she was settled. As to where SS might have heard "no dinner for you [SS]", FF suggested this could have been at school. In terms of the other disturbing references within her echolalia, FF said these could have been things SS heard at school, from children (including those at home) or elsewhere. He was adamant that neither he nor his wife would have said such things to SS. FF also said that the abusive language was typical of what one hears in a care home and suggested SS might have heard abuse after she was removed from their care.

81. FF gave very confusing evidence about seeing his wife "untie" a child (not SS) when FM was working as a special needs teacher. This arose from a reference to FM tying a child up at school within ECC's records summarised in the 1998 investigation. This was clarified during FF's evidence and whilst the allegation is alarming, I do not find that this occurred in the manner alleged.

82. FF said he had once kicked one of his adopted sons in the back when the children were wrestling and out of control. I was concerned by FF's admission to kicking a child in the back, even in this context.

83. FF said SS rarely went to see a GP as she was not often ill. He suggested around 10 visits (but said this was a guess) during the time she was in his and FF's care. As to SS's frequent absences from school, he said that she would suffer from colds and flu but these did not require medical attention.

84. Regarding SS's weight, FF disputed the conclusions of the gastroenterologists. He said that they had not examined SS and had taken measurements from the care home which would often be wrong. FF said that SS was thin but not emaciated when she left the family home. He put her condition upon removal down to SS having a previously undiagnosed thyroid condition. As Mr Ford correctly points out, FF cannot give opinion evidence on this point, however, to be fair to FF, he was invited to provide an explanation for the medical evidence by Mr Ford.

85. FF said that he did have concerns about his wife's drinking at times and said she would take pills with a glass of wine. He denied that she had an alcohol problem.

86. Mr Ford put to FF that ECC was not aware of SS's living arrangements and that he had sought to conceal these from ECC. I found this proposition surprising given that (even with ECC admitting liability in negligence) there must have been visits to the family home by social workers over the many years SS lived with FF and FM at their current address. The records (some of which are summarised above) show that there were visits to the home during the relevant period and ECC staff and medical professionals did see SS's rooms. Mr Ford accepted that this must be correct.

87. FM was 72 at the time of the trial. Her evidence was easier to understand than FF. I found her to be a truthful if somewhat confused witness. Her evidence was broadly consistent with that of FF.

88. FM worked as a special needs teacher from the 1960s until she retired in the 1980s. FM said SS as was a pupil at the school where she then taught. SS moved in with her and FF on an emergency basis after her parents could not look after her. At this time there were two other female foster children at home. SS was five when she arrived and could not speak, was not feeding properly and not mixing with other children at all. FM described what she saw as SS's progress as she lived with her.

89. FM said that SS continued living with the family over the years as she was happy and well.

90. FM said that SS left school in 1994 as SS had "had enough". She continued to go to college at times, however, and would attend other activities.

91. FM told me that she enjoyed having SS in the house as she was part of the family and that she loved her. FM said that she and SS "did nice things together" such as going to the theatre and that they had the same taste in music. She described SS crying during a sad scene at the theatre, a very rare occasion upon which SS displayed emotion in response to a fictional narrative which she said was amazing.

92. FM gave evidence on the discrete matter of a child in the school where she taught being "untied". She said that "reins" had been provided by the child's parents and a special chair was obtained which meant the reins were not necessary in the classroom. The child wore a helmet to protect her head. Whilst this evidence was a little clearer than that given by FF, I still did not quite understand what was being described. The use of reins and later a chair were said to have been approved by the school. As this did not relate to SS and as there is no suggestion that SS was ever tied up, I have not placed any weight on this evidence. I do not find that FM ever tied a child up as a punishment.

93. In reference to another entry in ECC's records, FM denied having kicked a child in her care when intoxicated (again not SS). There was no proof that this happened aside from an anonymous entry within social services records which I am not prepared to accept as proof of such an incident absent any supporting evidence and in the light of a clear denial from FM.

94. FM denied being an alcoholic but said that she did drink and that she would sometimes take alcohol with painkillers. She would only drink in the morning if she had been up all night caring for SS. FM did not accept that her drinking impacted upon her care of SS.

95. FM said that SS would eat breakfast and then various snacks before having lunch. SS would always have the main meal in the evening which the family called tea. If SS did not feel like eating tea, it would be kept and later heated up in the microwave. FM strongly denied withholding SS's food as a punishment. She said that on occasions she would not give SS treats such as sweets or biscuits or would delay providing these if SS was misbehaving. FM denied ever using phrases such as "no dinner for you" and asked why would anyone withhold food as a punishment saying that it makes no sense.

96. FM denied ever hitting SS. She said "I can't imagine slapping her" and also denied threatening SS.

97. FM said that SS was registered with a doctor but she did not go very often as she was rarely ill. SS had medicals but these were with a doctor who would see the children when they were at school. As set out above this seems to be correct.

98. As to the rooms SS lived in, FM said that SS would generally sleep on her bed and she (FM) would often sleep with her on the sofa within the sitting/day room. The screen/barrier was put in place as SS had to be secured at night as she would not be safe wandering around the house. SS had no concept of danger or time and would try to leave the house in order to go to the shops in the night or could do other dangerous things such as turning on the gas cooker.

99. FM said that the barrier was rarely secured during the day and would often be pulled fully back. She said that SS would spend most of her time in the garden or around the house. She did not accept that SS was often confined to her two rooms and said that 90% of the time she would be out and about. On this point FM said during cross examination "that sounds like she spent 27 years behind a barrier but that is not the case at all…most days we had something to do. We went shopping, we went swimming and I took her to clubs, she did the Duke of Edinburgh Award."

100. FM said the barrier system was used for several years but she was not sure exactly how many. She thought it would have been present in 1998 when social workers visited the home following the removal of Child A. This is confirmed by the references in the records summarised above.

101. As to the condition of SS in 2009, FM did not accept that SS was severely malnourished. She said that she herself had been ill for two weeks and SS then fell ill with the same bug and suffered the effects for around one week before the police arrived. During this time, FM was not able to wash SS who could not have a bath as she was unable to control her bowels due to her illness. SS was not wearing underwear for the same reason. FM said that SS was thin but not emaciated. She would have lost weight during her period of illness. FM said that conditions in SS's room and the house in general were worse in May 2009 than normal as a result of the illness within the family.

102. FF said that SS had plenty of clothes and she enjoyed going shopping with her. She said that in the police photographs, the clothes shown belonged to SS. These photographs show only the corridor leading to SS's rooms. They do not show the rooms themselves.

103. As to SS's echolalia, FM said this was present before she arrived with the family (as is accepted by ECC). She said that some of the more disturbing outbursts were likely learned from her birth father or brother and were related to her incontinence at that time. She denied that she or FF would ever use such phrases towards SS.

104. FM said she thought her care for SS was adequate. She accepted that her standards might not be the same as that of social workers but denied that they were significantly lower.

105. Within the evidence served by FF and FM are ten colour photographs of SS at home and on holiday with (variously) FF, FM and their adopted children. These appear to show SS as a child over a period of several years (broadly from six years old up to 14). In these photographs SS appears happy, appropriately dressed, healthy and part of the family. Whilst these photographs provide limited evidence of themselves, they present a contrast to the case put during cross examination. There were no photographs provided of SS as an adult.

106. After the hearing had concluded I received an email informing me that FF had emailed further photographs to ECC showing (i) the school FM taught at and (ii) further photographs of the family (including SS) on holiday. I indicated that I proposed to consider only the evidence served at the hearing as it would be wrong to consider further evidence at this late stage when there was no good reason why this could not have been provided at the trial. I am mindful that FF and FM are unrepresented in these proceedings. I do not think, however, that this material would have a material impact upon this judgment.

VII. FINDINGS BASED ON ALL OF THE EVIDENCE

107. It is common ground that some of the matters in the Claimant's particulars of claim are incapable of being proved. In particular ECC did not seek to prove that SS was sexually abused when she was in foster care. This is a significant part of the claim brought by SS.

108. I do not find that SS was physically assaulted by FF and or FM when she was in their care. There is insufficient evidence to support such a conclusion and Mr Ford did not ultimately seek to persuade me that any such assaults occurred in his oral or written closing.

109. Turing to the first of three findings I was asked to make by ECC in closing, I find that SS was severely malnourished when the police attended in May 2009. I reject the suggestion from FF in particular that this was the result of an error when SS was weighed and/or measured or that her emaciation was a result of a thyroid condition. There is no evidence to support such a proposition.

110. I accept that FF and FM owed SS a duty of care (they were her carers) and that this was breached by failing to provide her with sufficiently nutritious food over a period of time.

111. A more difficult question is how long the period of malnutrition lasted for. The issues between the experts narrowed considerably as a result of the joint meeting (the conclusions of which are summarised above) with significant movement from Professor Milla.

112. Dr Woodward did not think that SS's malnutrition could be attributed to a short period of weight loss related to an acute gastrointestinal infection. The experts agree that the earliest the period could have begun was July 2006 as there is evidence that SS was not malnourished at this time. I therefore reject ECC's second submission that the malnutrition likely pre-dated 2006.

113. Given the serious nature of SS's malnutrition and the poor conditions in the family home (see below), I am satisfied that the period of malnutrition lasted for at least 18 months. I note in this regard that the last record I can find relating to the condition of SS before her removal was that dated June 2007 when she was said to be "cheery, friendly and appeared to be well supported".

114. I do not find that SS was emotionally abused by FF and FM. The primary evidence relied upon in this regard is that of the echolalic outbursts which FF and FM accepted in evidence occurred (though primarily at school rather than at home).

115. I am not able to conclude on a balance of probabilities that the disturbing phrases repeated by SS were things said to her by FF and FM by way of threats or emotional abuse. I accept that it is a reasonable conclusion that these are phrases she could have heard at school, from children (including those in the FF/FM family home) or on residential trips. As it is accepted that the echolalia was present before SS was in the care of FF and FM, some of the reported phrases could also relate to things she heard in her early childhood. There was a focus upon the reported use of the phrase "no dinner for you SS" which was obviously relevant given the evidence of the gastroenterologists, but that this appears to have been a single report dating back to 1993, well before the evidence shows that the period of malnutrition began.

116. The trial bundle contains a number of concerns expressed by social services about the care provided by FF and FM and their conduct more generally between (in particular) 1982 and 1998. There is reference to a rigid routine in the family home and instances of FF and FM using inappropriate discipline (though importantly not towards SS). Having heard from FF and FM, however, I am not satisfied that they emotionally abused SS. I accept their evidence in this regard.

117. As to the fourth invited finding namely that SS was very seriously neglected due to the appalling conditions at home, I have had to ascertain what reliable evidence there is of conditions within the home over the course of SS's residence with FF and FM to determine the extent of any neglect and how long it lasted for.

118. A clear picture emerges from the records of the house being routinely dirty and of long standing concerns about FM's drinking. There is a smaller quantity of material which contradicts this and is supportive of FF and FM, in particular the 2003 report and some of the extracts contained within the expert reports which are dated between 1998 and 2007 (summarised above).

119. The evidence shows that the house was in an appalling state on 14/05/2019 and in particular SS's rooms smelt terrible due to the use of the chemical toilet which had not been emptied. I am also satisfied that the level of personal care taken of SS was very poor. She was unwashed, wearing filthy clothes and had lice. The house was very dirty and in particular the rooms used by SS had not been cleaned for some time. It cannot be an answer to this level of neglect for FF and FM to say that FM and SS had been unwell for a week or two. If SS's carers were unable to look after her due to a period of illness, they could have requested help from ECC. They did not do so. It is unreasonable to suppose the house could have deteriorated to such an extent in that time period or that SS would have picked up an infestation of lice during a short period of illness.

120. It is clear that standards were deficient within the FF and FM house for some time and FF and FM neglected SS's basic needs. As her carers, FF and FM were therefore negligent in that they failed to:

    i. provide SS with an acceptable living environment within the house and within her bedroom and day room. I find that the house and in particular her rooms were dirty and smelt strongly of urine due to a lack of basic hygiene and the camping toilet not being cleaned;

ii. ensure that SS's personal hygiene was attended to. I find that SS was unwashed, wearing dirty clothes, infested with lice and generally left in a condition that was completely unacceptable.

121. As to how long this neglect lasted for, the 2003 report suggests that standards were much better at that time when SS is said to be happy, well and healthy. This is stated as the view of not just the carers but also the social worker and SS herself. Whilst SS would find it difficult to articulate a complaint to a visiting social worker, the report is clear that the social worker visited the house and was shown SS's rooms. She recorded that SS was happy, healthy and well.

122. The ECC records (such as they are) raise concerns about FF and FM and their care of SS (and others) between 1982 and 1998. There is very little evidence as to what was happening between 1998 and 2009 aside from the positive 2003 report and the extracts from between 1998 and 2007 which do not disclose neglect and are in parts positive. The records that do exist for earlier periods do not enable me to come to any relevant findings against FF and FM on a balance of probabilities. This is due to the fact that they are heavily redacted and in the main part anonymous. More needs to be proved than that on a few occasions the house was said to be dirty and/or smelly.

123. I find it reasonable in all of the circumstances to conclude that the neglect of SS lasted for the same period of time as the malnutrition namely at least 18 months. I infer that if SS was not being properly fed for that period then it is reasonable to conclude that she was being neglected in other ways. Whilst conditions in the house might have been worse in May 2009 as a result of the family illness I cannot accept that such a dramatic decline could have happened over two weeks.

124. The use of the screen/barrier is a matter I have given careful consideration to. It is clear that given SS's needs, she could not have been allowed to roam around the house at night. I accept the evidence of FF and FM that this would have been unsafe as SS had no danger awareness or sense of time. SS is restricted in her movements within her current residential home where she is also now medicated. There is reference within the residential home records to SS having no sense of danger and the risk or instance (it is unclear which) of her touching a hot stove. This supports what FF and FM said about the need to control her movements at night.

125. Mr Ford has forcefully submitted that I am not able to conclude on the evidence that a domestic foster home was never suitable for SS. That being so, some system had to be put in place to keep SS safe in such a setting. I do not think that the barrier was a good system but it was a reasonable measure for FF and FM to have put in place and one which ECC was aware of. The suggestion put by Mr Ford that this was concealed from ECC is unsustainable given the 2003 report. Furthermore from the entries within the expert reports set out above, it seems that the clinical psychological report dated 11/10/1999 raised no concerns about this arrangement whether to do with the use of a barrier or its use in combination with a chemical toilet.

126. ECC did not in the event invite a finding of false imprisonment but rather put this as a feature of the neglect. In the circumstances and given SS's very significant needs, I do not consider that the use of the screen/barrier alone would amount to false imprisonment. It was used to keep SS safe and was a poor but effective mechanism of doing so.

127. I found FM's evidence as to how often SS was behind the screen much clearer than FF's. I do not find that SS was secured behind the screen for significant periods during the daytime. Having accepted FM's evidence on this point, I did not think that SS would be behind the barrier for "half of her waking hours" as I find that FF was agreeing with a proposition

without fully understanding it. I preferred FM's evidence on this point. This is supported by the extract from the 1999 clinical psychological report referenced at paragraph 59 above.

128. The use of the screen and chemical toilet however would have made it especially important to ensure that the room was regularly cleaned and SS was properly looked after and washed. That certainly was not the case on 14/05/2009 or on my findings for 18 months beforehand.

129. As to how this happened I find that it was due to inadequacy on the part of FF and FM. This resulted from a combination of their age (though they would have only been in their late 50s at the time), SS's very challenging needs, FM's drinking (which I find was problematic and interfered with her ability to care for SS) and to a lesser extent the fixed opinion of both carers that they knew what was best for SS and were able to care for her despite the conditions at the family home. I do not find that this was a form of punishment nor that this was "torture" or similar as set out in the Claimant's pleadings.

VIII. LIABILITY

130. I must decide whether FF and FM are in the words of section 1 (1) of the 1978 Act "liable in respect of the same damage as ECC".

131. In his written closing, Mr Ford sets out a staged approach for the court to adopt in determining liability. ECC submits that "the same damage" is the damage for which ECC is liable" which in turn he defines as "damage (if any) caused to SS by FF and FM."

132. In relation to the question "Are FF and FM liable in respect of that damage" Mr Ford submits the answer is "Yes, if SS would have been entitled to compensation from FF and FM in respect of that damage."

133. These submissions apply sections (1) and (6) of the 1978 Act and I accept them.

134. What damage ECC compensated SS for is difficult to identify as I have heard no evidence as to the basis of that settlement (see below).

135. As to the damage alleged in this Part 20 trial, ECC's Particulars of Additional Claim provide that:

> "The Defendant admits that had the Claimant been removed from your care by November 1982 she would have been spared such sexual, physical and emotional abuse, false imprisonment and neglect as she may prove that she sustained between that date and the date of her removal from your care on 14 May 2009.
>
> If and insofar as the Claimant [SS] may prove that she sustained the personal injury alleged in the particulars of claim in the manner that she claims, that damage was caused by you in that you:
>
> Committed acts of trespass to her person in the form of assault battery and/or false imprisonment and/or
>
> Negligently caused harm to the claimant and/or
>
> Negligently failed to protect the claimant from harm caused by others
>
> By reason of your said trespass to the claimant and or/or negligence the defendant [ECC] has sustained damage namely such liability to

> compensate the claimant ad the claimant may prove in this action and the costs of defending the claimants claim."

136. It follows that the pleaded damage is "such damage as SS might prove against ECC." Mr Ford accepts the burden of proving liability against FF and FM rests upon ECC in this trial.

137. In SS's particulars of claim, damages were sought for (amongst other matters) "neglect" and "starvation". SS sought both general damages for pain and suffering and special damages in relation to the need for additional special care needs and psychological treatment.

138. As I have found that FF and FM are responsible for the neglect and malnutrition in the manner I have set out above, it follows that they are liable to ECC for this damage.

IX. CONTRIBUTION

139. Having made such a finding I must go on to consider the amount of the contribution recoverable from FF and/or FM that is just and equitable having regard to the extent of their responsibility for the damage in question. Section 2 of the 1978 Act deals with contribution and provides insofar as relevant:

> "**2 Assessment of contribution.**
>
> (1) Subject to subsection (3) below, in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.
>
> (2) Subject to subsection (3) below, the court shall have power in any such proceedings to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity."

140. It is accepted that the court at this stage has (in Mr Ford's words) the widest possible discretion.

141. I asked FF and FM for submissions on the level of contribution should they be found liable. FF said that he and FM have no assets other than the family home and that if ECC were to make him and his family homeless, the reality was that he would be looking to ECC for assistance with housing. Mr Ford correctly stated within his written opening and oral closing that the means of a Part 20 Defendant are not relevant. Should authority be needed for this proposition see *Mohidin v Commissioner of Police of the Metropolis* [2015] EWHC 2740 (QB) at [28]. I have not therefore allowed the means of FF and FM to play any part in my decision.

(a) Compensation paid to SS

142. SS sought over £7 million (all of which related to SS's ongoing care needs said to have been caused by the damage) but the approved settlement saw SS receive only £325,000 in full and final settlement of the claim.

143. In his closing submission, Mr Ford accepts that if I found that FF and FM:

> "caused SS some damage but not all of the damage that SS received compensation for from ECC, that is a matter the court can take into

> account in determining the amount of the contribution under section 2 (1) of the 1978 Act."

144. To perform such an exercise, I need to know what "the damage SS received compensation for" is.

145. Mr Ford could not make submissions as to the basis of the settlement, conceding that it would not be right for him to "give evidence" on this point. There was no evidence from his client dealing with the settlement. In his closing submission Mr Ford invited me to draw common sense inferences that the settlement:

> (a) included compensation for the damage for which ECC assessed it probably would be found liable, but also a sum to reflect the damage for which it recognised it might have been found liable;
>
> (b) included compensation to account for the risk that SS's medical evidence would be preferred and the court would find that she suffered psychiatric damage (PTSD) as a direct result of treatment by [FF and FM];
>
> (c) took account of the risk that the claim could have a value of many millions of pounds, if the care claim could be sustained;
>
> (d) must have involved a recognition on the part of SS's advisers that some of the factual allegations made in the particulars of claim were not likely to be established, and some of the financial losses claimed in the schedule were not likely to be awarded.
>
> (e) did not include a discount for litigation risk, as liability was admitted.

146. It is uncontroversial that ECC would come to a commercial and tactical decision to settle based upon a risk that certain matters could be proved even if this was not probable. The most important considerations would be the risk that at trial the court would find (i) that the abuse was more serious than that which ECC thought probable (and/or alleged in this trial) (ii) that SS suffered PTSD as a result of that abuse (iii) that abuse had worsened her cognitive impairment and (iv) that the abuse had caused SS to require ongoing care valued at millions of pounds based on the medical evidence that she served. None of these matters have been proved in this trial however.

147. It follows that a proportion of the £325,000 damages was paid because of these risks. Whilst Mr Ford submits that there was no consideration of litigation risk as liability was accepted, that is semantics. There was undoubtedly risk in litigating quantum as set out in ECC's submissions above.

148. ECC has not sought to persuade me that SS has any ongoing care needs caused by FF and FM. ECC also accepted that it would not be possible for me to resolve the polarised opinions of the psychiatric experts instructed by SS and ECC without a joint expert report being produced and/or the experts attending to give oral evidence. Even if I could resolve this, my findings in relation to sexual and physical abuse vary considerably from the conclusions drawn by for example Dr Andrews.

149. Some assistance as to what damage ECC was compensating SS for is provided within the counter-schedule referenced above which was served before settlement. ECC counter offered a payment of £100,000 for severe pain and suffering (based on a long period of physical and sexual abuse) and (in the alternative) an additional figure of £170,331.1 for care needs and case management costs. The total figure is £270,331.1 which is £80,000 less than the sum

that ECC eventually settled for. I have not, however, found that SS was physically or sexually abused by FF or FM, nor that their negligence has caused any ongoing care needs.

150. Mr Ford's position has always been that ECC is entitled to an indemnity and that I should order that FF and FM pay £525,000 (the sum of £325,000 damages along with a contribution in costs which matches ECC's interim payment of £200,000). I am satisfied that this would not be just and equitable based upon the findings I have made.

151. I do not consider that it would be just and equitable in this case to require FF and FM to compensate ECC for the risk of findings which were not proved in this trial as I have not found that they are responsible for this damage. This applies to both alleged acts which I do not find have occurred (including assaults and emotional abuse) and periods of time in which it has not been proved that FF and FM were responsible for any relevant damage. The claim brought by SS alleges abuse between 1981 and 2009 but I have found that FF and FM are responsible for negligence only which lasted for 18 months.

152. I also do not find that it would be just and equitable in this case to require FF and FM to compensate ECC for its decision to pay SS in order to avoid a risk that the court would find that FF and FM's actions caused PTSD and or ongoing care needs. On my findings FF and FM are not responsible for any such damage.

153. I am satisfied that some of the damage for which ECC compensated SS relates to the severe malnourishment which occurred latterly during her stay with FF and FM. The effect of the joint gastroenterologist report, however, is the effects of the period of malnutrition upon SS's long term health are negligible. The malnutrition has not created any additional care needs.

154. I have also found that FF and FM's negligence in caring for SS was the cause of the completely unsatisfactory conditions within the house between 2007 and 2009 which amounted to neglect of SS. This was, however, but a small part of the claim advanced by SS. Whilst the impact this would have had upon SS must not be understated, the evidence shows that the only damage this caused was SS having to endure such an environment. It is not suggested that conditions over this period of time have contributed to her care needs or affected her cognitive impairment.

155. The damage for which FF and FM are responsible is therefore pain and suffering SS endured as a result of their negligence over the course of 18 months in respect of (1) malnutrition and (2) further neglect as set out above.

156. Given the period of time over which this negligence occurred, SS's age at the time and the blameworthiness and causative nature of FF and FM's negligence on the findings I have made, I consider it just and equitable that FF and FM should compensate ECC for this damage. As between FF and FM, they are equally responsible for the damage.

157. Mr Ford has urged me not to attempt to value such part of the claim as I might find proved against FF and FM and declined to assist with a valuation submitting that to do so would be wrong in principle as this is a statutory claim and not a tort claim. Mr Ford submits that if the 1978 Act envisaged such a course then it would say so and submits that I have a much broader discretion.

158. Mr Ford refers me to the settlement figure of £325,000 but this is of very limited assistance for the reasons set out above. I do not see any sensible way in which I can calculate by means of a percentage of this figure what a just and equitable contribution would be to reflect what I have found proved. I have considered whether this leads me to a conclusion that I cannot arrive at a figure that is just and equitable and should therefore exempt FF and FM from

making a contribution. I do not think that this would reflect my findings and could be unfair to ECC.

159. In the unusual circumstances of this case, I have decided that the only just course is to value the damage for which FF and FM are liable. It would be wrong to exempt FF and FM from making a contribution even if the sum in question is much lower than that which ECC sought to recover in this trial. It is unfortunate that I have not had assistance from either party in this regard (as ECC declined to do so on principle and as FF and FM are unrepresented).

160. The Judicial College Guidelines do not deal with malnutrition or neglect of the kind I have found proved in this case. In relation to malnutrition it is possible to draw a parallel with food poisoning:

> "(iii)Food poisoning causing significant discomfort, stomach cramps, alteration of bowel function and fatigue. Hospital admission for some days with symptoms lasting for a few weeks but complete recovery within a year or two.
> **£3,950 to £9,540**"

161. In relation to neglect I have had regard to the "less severe" level of damages pertaining to physical and sexual abuse (making clear that I have found none proved in this case) also by way of a parallel:

> "Where the abuse is a lower level of seriousness and short-lived and the psychological effects are mild or resolved quickly, or the prognosis for resolution with treatment is very good. There will be few if any aggravating features.
> **£9,730 to £20,570**"

162. Taking the two areas together I value the damages for pain and suffering caused by the malnutrition and further neglect at £14,000.

(b) Costs paid to SS

163. ECC also seeks a contribution to the costs it paid to SS in the sum of £200,000. This figure derives from the interim payment on account in respect of costs which was made shortly after the 2022 settlement.

164. ECC submits that costs paid to SS are part of the same damage and thus recoverable as part of the contribution in this claim. In *Parkman Consulting Engineers v Cumbrian Industrials Ltd* [2001] EWCA Civ 1621, the Court of Appeal suggested that such costs are recoverable under the 1978 Act. This approach has been followed in subsequent cases. I accept, therefore, that ECC is correct to state that I have a discretion to include such costs as part of the same damage.

165. I agree with ECC that a contribution should be made towards the costs paid to SS. I must determine how much this should be. This court stated in *Mouchel Ltd v Van Oord* [2011] EWCH 1516 (TCC) that different considerations apply depending upon whether costs are sought as part of a contribution under the 1978 Act or pursuant to Section 51 of the Senior Courts Act 1981. As set out above, the 1978 Act provides that the contribution shall be "such as may be found to be just and equitable having regard to that person's responsibility for the damage in question" with causative potency likely to be the most important factor. Under the 1981 Act, the court must have regard to the matters set out in CPR 44.2 (which I consider below in relation to costs of this action). I am concerned here with the 1978 Act.

166. In *Mouchel*, the court decided that contribution as to costs should follow the percentage contribution in relation to damage. Whilst the basis of the damage contribution in *Mouchel*

was different to the instant case (as there were multiple areas of liability and it was only contended that Van Oord was partially responsible for one of them) I consider that in this case it would be just and equitable for a broadly commensurate proportion of the costs to be paid. I do not think that it would be just and equitable to require FF and FM to pay a higher sum having regard to their level of responsibility for the damage in question. This is for the same reasons I have set out above in relation to the amount of the compensation to be paid by FF and FM. This I assess to be £10,000.

(c) Conclusion on contribution

167. I therefore conclude that FF and FM are liable for a contribution in the sum of £24,000.

X. COSTS

168. At the conclusion of proceedings, I invited written submissions from all parties on costs of the Part 20 claim.

169. Mr Ford's submission notes that the starting point is that the unsuccessful party pays the costs of the successful party, see CPR 44.2(2)(a). Mr Ford submits that (i) ECC is the successful party and (ii) the principal ground upon which the court will make a "different order" is where an offer has been made under CPR rule 36 which has not been beaten. As no such offer was made by FF or FM in this case, Mr Ford submits that ECC is entitled to its costs in full to be assessed on the standard basis.

170. I did not receive any submissions from FF and FM as to costs.

171. As CPR 44.2 applies to this application, different considerations apply to the recovery of costs paid by ECC to SS (see above).

172. In *Medway Primary Care Trust v Marcus* [2011] EWCA Civ 750 the costs order under appeal concerned a trial in which quantum was agreed at £525,000 but the Claimant lost on causation in relation to the primary issue (a limb amputation) and was awarded only £2000 for pain and suffering over a limited period of time. The trial judge awarded the Claimant 50% of his costs. The majority in the Court of Appeal held that the low level of recovery did not amount to a vindication for the Claimant and the defendants were therefore the successful parties. The appeal was allowed and the Claimant ordered to pay 75% of the Defendant's costs. Jackson LJ gave a dissenting judgment on the basis that there had been no Part 36 offer and the Defendant should pay the consequences. He stated that in a personal injury case where (a) the claim was pursued in a reasonable manner, (b) the Claimant recovers damages (other than notional damages) and (c) there is no or no sufficient part 36 offer; the starting point should be that the Claimant recovers their costs. If the Claimant has lost on major issues which generated significant costs, the court will exercise its discretion under CPR 44.2 to reduce recovery. On the facts, an award of 50% of the Claimant's costs was "on the generous side".

173. In *Fox v Foundation v Piling Ltd* [2011] EWCA Civ 790, the Court of Appeal (Jackson LJ giving the lead judgment) reviewed a number of authorities and noted the following:

    i. the importance of Part 36 offers (or *Calderbank* offers made outside the framework of Part 36) as a means of costs protection;

    ii. where the successful party has lost some issues in the case this may be a good reason for modifying the usual costs order. This is commonly achieved by awarding the successful party a specified proportion of their costs. In an extreme case, the successful party was ordered to bear all its own costs see *Widlake v BAA Limited*

[2008] EWCA Civ 1256; [2010] PIQR P4 (which also related to the conduct of the Claimant).

174. Despite the low level or recovery, I accept Mr Ford's submission that ECC is the successful party and the general rule therefore applies. I note that there was no Part 36 offer from FF and FM and so I cannot make a different order upon this basis. Whilst I note that FF and FM are litigants in person who would not be aware of the consequences of Part 36, they did not accept any fault in this claim and the only way that ECC was able to prove liability was by taking the case to trial.

175. Whilst an important consideration, the making of a Part 36 (or *Calderbank*) offer is of course not the only basis upon which a different order as to costs can be made. I must consider all of the circumstances including CPR 44.2(4)(b) "whether a party has succeeded on part of his case, even if he has not been wholly successful".

176. ECC has not won on many of the important issues in the claim including (i) the (abandoned) argument that ECC did not need to prove liability (ii) the (broadly abandoned) allegation of physical assaults (iii) the duration of starvation (iv) emotional abuse (v) the duration and extent of neglect and (vi) recovery of damage that was not proved in this Part 20 claim and/or compensation for risk. The level of damages whilst not notional is very significantly lower than that which ECC sought. In my judgment the appropriate course is to vary the normal order by ordering that the Part 20 Defendants pay a proportion of the Claimant's costs. In all of the circumstances and given the number of issues upon which ECC did not succeed and the low recovery in this case ECC is entitled to 33% of its costs to be assessed on the standard basis.