Neutral Citation Number: [2012] EWHC 604 (Admin)

Case No: 9CL02483

IN THE CENTRAL LONDON COUNTY COURT

Sitting at the Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 March 2012

Before :

SIR ROBERT NELSON

- -

Between :

ZH (A protected party by GH, his litigation friend)	**Claimant**
- and -	
The Commissioner of Police for the Metropolis	**Defendant**

- -
- -

Heather Williams QC (instructed by **Bhatt Murphy Solicitors**) for the **Claimant**
Anne Studd (instructed by **the Metropolitan Police Service**) for the **Defendant**

Hearing dates: 28th, 29th, 30th November and 1st, 5th, 6th and 8th December 2011

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Approved Judgment

SIR ROBERT NELSON :

Introduction

1. The Claimant, ZH, is a severely autistic, epileptic nineteen year old young man who suffers from learning disabilities and cannot communicate by speech. He brings this claim through his father, as his litigation friend. The claim is for damages, for assault and battery, false imprisonment, unlawful disability discrimination under the Disability Discrimination Act 1995 (DDA), under the Human Rights Act 1998 (HRA) alleging breaches of Articles 3, 5 and/or 8 of the European Convention on Human Rights (ECHR) and for declaratory relief. All the claims are denied. In 2008, when the events leading to this litigation occurred, the Claimant was sixteen years of age, living at home and attending a specialist day school, the Sybil Elgar School, Southall, Middlesex, run by the National Autistic Society.

The Background Facts

2. On 23 September 2008 the Claimant was taken with four other pupils from his school to Acton swimming baths on a familiarisation visit. It was not intended that any of the children would swim or be in close proximity to the water on that day. The pupils were accompanied by three of the school staff, Padmaja Namballa, ZH's class teacher, and two classroom assistants. One of those assistants, Sateesh Badugu, was tasked with providing one:one support to the Claimant.

3. When the pupils left the viewing gallery above the pool, the Claimant broke away from the group and made his way to the poolside. He became fixated by the water and despite his carer's attempts to distract him by offering him crisps, he could not be encouraged to move away from the poolside. The school staff were aware that ZH had an aversion to being touched and would be likely to react adversely if this was done, so they did not attempt to do so. Becoming fixated, or "stuck", and aversion to being touched are both common features of autism.

4. Ms Namballa returned to the school, which was nearby, with the other students intending to return to the pool with assistance. She asked Mr Badugu to stay at the pool in charge of the Claimant.

5. Before Ms Namballa left, Yvette Burton, a lifeguard, came on duty. She saw ZH standing fully clothed by the poolside railings when she arrived. He was extremely close to the water and at that point she could not stand between him and the pool. The railings, with the lifeguard's chair next to them and the blue doors leading to the corridor behind them, can be seen in photograph 20. Mrs Burton (then Ms Cole) spoke to another lifeguard who had been on duty, Joe Starkey, and was informed that ZH had been standing there for 20 or 30 minutes and would not move away. Mrs Burton contacted her manager, Christian Hartland, and told him that there was a boy standing by the poolside who would not move away. She did not say to him that he was about to jump, though she was concerned that he might enter into the water, and felt that either way they could not have a member of the public at the poolside fully dressed in case he did fall into the pool.

6. Whether or not Mrs Burton later managed to place herself between ZH and the pool, he having moved somewhat away from the edge, is a matter in dispute, but Mrs

Burton's evidence that the female carer told her in no uncertain terms that she could not stand in front of him and that she must not touch him as he was autistic, is consistent with that part of Ms Namballa's evidence where she accepts that she did say to a member of the pool staff "if you touch him he will jump in",

7. Mrs Burton describes the male and female carer as standing by the blue doors, verbally trying to distract ZH with food and the promise of food.

8. Mr Badugu agreed that after Ms Namballa had left to take the other pupils back and get assistance he was a few feet into the corridor trying to entice ZH away from the pool with a packet of crisps. He had moved closer to ZH to show him the crisps but this had caused ZH to move to the edge of the pool ready to jump in, so he stayed a bit away from him in the corridor. He was in that position when Christian Hartland, the pool manager, responded to Mrs Burton's call and came to the poolside, though Mr Hartland described him initially as sitting on the wooden bench, rather than standing, in the corridor near the blue doors. Mr Badugu told Mr Hartland that ZH needed time but Mr Hartland said that he did not think that the carer would know better what to do. Mr Hartland said in evidence that they had a swim safety policy by which everyone who could not swim had to be accompanied by an adult. He was aware that ZH had been by the poolside for a significant period of time by then, and said to Mr Badugu that he needed to do something to remove ZH from the pool or he would call the police. Mr Badugu said to him that ZH's teacher would come with his stuff and get other staff members to help to deal with the situation and asked him not to call the police because he was not hurting himself or being dangerous to anyone around.

9. Mr Hartland sought himself to persuade ZH to move away from the pool, buying a can of coca cola for him and seeking to tempt him away with that. This did not succeed and having lost patience with what he regarded as the carer's ineffectiveness he decided to call the police. His intention was to call the Police Community Support Officers but when he made the telephone call they said it should have been a 999 call and put him through to the operator.

10. The information which Mr Hartland gave to the operator at 15.24 was recorded as follows:-

> "We have a disabled male trying to get in the pool… the carer is trying to stop him and he is getting aggressive"
>
> "He is quite a big lad".

11. In the Incident Report form which he filled in on behalf of his employers on the day of the incident Mr Hartland described the situation as "getting worse as Z started to get angry and edge closer to the pool". There is no evidence from any other source which suggests that at any time ZH was in fact aggressive, or indeed angry, by the time Mr Hartland made his call to the Police. In his own evidence Mr Hartland said that he had initially sought to call the PCSO, rather than the Police, because he did not think it was a real emergency and agreed that ZH had not been aggressive up to that point and no-one had suggested that he had been. He said in terms that ZH was not aggressive and that that had not been the case, but that he had given that impression

when speaking to the Police on the telephone probably because he was panicking, having never faced such a situation before.

12. Throughout the time that ZH was at or near the edge of the pool he was demonstrating his great liking for the water. He could not swim but had no fear of the water nor indeed any knowledge of its danger. His position at the poolside was about midway the length of the pool at about the point where the bottom of the pool starts to slope down towards the deep end. The shallow end is .96 metres and the deep end is 1.97 metres. ZH's behaviour whilst he was at or near the edge of the pool is variously described as including one or more of the following: making high pitched squeals, jumping up and down, rocking, and moving, backwards and forwards, and moving or waving his arms about. Whatever the precise manner of his behaviour was, it was clear to those who observed him that he was disabled.

13. The school had experienced problems with ZH at swimming pools in the past. On previous occasions he had not wanted to leave the water and had also wanted to return to it after he had got out, resulting, on three occasions, in physical intervention by Mr Kavanagh, the Deputy Head Teacher, who described the linking arms process by which he had physically propelled ZH on those earlier occasions away from a pool. The individual risk assessment of June 2008 in relation to ZH (F/56, D/65) showed that amongst his potential behaviours were running away from staff, pinching, hitting out and pushing other people over, jumping into swimming pools, and seizing any opportunity to jump into water. In fact that latter risk had never materialised though the potential for it clearly existed in view of his great liking for the water. The level of concern which was caused by ZH's behaviour resulted in his not being permitted to go swimming. In January 2007 Mr Kavanagh recorded that ZH:-

> "is not going swimming presently as this activity poses an unacceptable high risk because of his reluctance to leave the pool. Once out of the water he will attempt to jump back into the pool and this carries a risk of injury to himself and others. ZH is not able to properly swim and when he has got out of the pool he has become upset and attempted to target both members of staff and members of the public." (D/484)

14. The visit to the Acton Swimming pool on 23 September 2008 was part of the re-familiarisation process aimed at assisting ZH to return to swimming. After the events of that day the school introduced a policy of using swimming pools with sessions closed to the public (FG2)

15. At about 3.30pm PC Hayley McKelvie and PC Emma Colley arrived at Acton swimming baths in full uniform. PC McKelvie spoke to Mr Hartland and went to the area where ZH was standing near the pool. She said that she did not speak to Mr Badugu because he was not there, but she had been told that there were two carers so she asked the lifeguard to get them so that she could speak to them. She said that she expected the carers to come, but the situation escalated and they did not come before ZH went into the pool. She said that when the police were called they had to be seen to be doing something and that her judgment was to speak to ZH herself.

16. Although PC McKelvie did not speak to the carers, PC Colley did. She mistakenly thought that both carers were present then, whereas, in fact, Ms Nambulla was back at

the school getting assistance and had not yet returned as she did shortly afterwards with Mr Maslach, another member of the school staff.

17. When PC Colley spoke to Mr Badugu in the corridor he told her that ZH was autistic and told her his name. PC Colley said that she could not stand there talking to the carer whilst someone might injure himself and possibly die. She felt she had to go and help ZH as there was an immediate risk to him and nobody was taking control of the situation. She said that she and PC McKelvie therefore had to do so. She would have asked more questions if she had felt there had been time but thought "that it was more important to deal with ZH before talking to the carers any further and getting any more detail"(paragraph 11 of her witness statement).

18. PC McKelvie also said that she perceived it as a life and death situation as ZH could have fallen in and could have drowned and died. She went up to ZH and said "Hello Z I'm Hayley" and touched him gently on his back to see if he would respond. She did not think that that was the catalyst for him jumping as he did not go into the pool immediately after she had first touched him. He moved closer to the pool and she thought he was going to jump in. She therefore took hold of his jacket just as he began to gather forward momentum towards the water and PC Colley also took hold of his jacket at the same time, but he was much too big and strong, and with his own weight the momentum took him forward and he ended up in the water. PC Colley also described PC McKelvie and her each taking hold of an arm to stop ZH from jumping in. That decision was not, she said, communicated, but necessary to prevent him falling into the water which they were unable to do. PC McKelvie said that she had no idea why he had jumped in then, nor did PC Colley though she accepted in cross-examination that having heard the evidence she accepted that he may have been reacting to their presence.

19. At 15.36, some six minutes after they had arrived at the pool, PC McKelvie sent a message to her control stating "male is now in the pool. Not in danger/drowning…one more unit". When ZH went into the water, it came up to about chest height. He still had his outside jacket on. PC Colley requested the lifeguards to go into the pool which they did, and everyone sought to persuade him to move towards the shallow end including one of the swimming instructors, Mr Andrew, who was by the side of the pool. By this time Ms Namballa had returned with Mr Maslach, bringing with her some of ZH's possessions to persuade him to come out. Mr Badugu moved from the corridor to the side of the pool after ZH had jumped in and the carers sought to wave lollipops, or a banana, or his possessions at him to encourage him to move to the shallow end and get out. The lifeguards formed a cordon when ZH started to move towards the deep end so as to encourage him to move back. One of them removed ZH's outer coat. At one stage he appeared to be bobbing up and down in the water; the balance of the evidence was that his head did not go under and that he did not at any time swallow any water.

20. When ZH had gone into the pool the evidence of most of the witnesses is to the effect that he was clearly enjoying himself, splashing the water and making excited noises. He resisted attempts by the lifeguards to move him towards the shallow end, apparently seeking to push Mr Hartland away when he came towards him. Mr Hartland said in evidence that the lifeguards then decided to grab him and remove him from the pool. They did so, two lifeguards holding ZH by his arms, Mr Hartland by

his legs. There were only about ten members of the public at the pool and it appears that one of them, who was still in the pool, assisted the lifeguards in holding ZH.

21. They moved him towards the shallow end holding him in this manner. From the time when he first went into the pool until he reached the shallow end was a period of some 5 or more minutes. During that time, or towards the end of it, PC McKelvie was able to send her message to police control to the effect that ZH was in the pool but not in danger/drowning. The police did not seek to take any advice from the carers during this time, nor to attempt to formulate a plan with them for the safe removal of ZH from the pool. Nor did the carers seek to proffer the police any advice or put forward any plan or proposal.

22. Whilst the lifeguards had been taking ZH towards the shallow end he was struggling or wriggling to free himself from their grasp. There is a difference between the witnesses as to whether he was struggling vigorously or merely wriggling at this stage. There is a further dispute as to whether when the lifeguards had got ZH to the shallow end they propelled him towards the steps in order to give him a chance to get out of his own volition, or whether they did not give him such an opportunity.

23. During the time that ZH was in the water and moved towards the shallow end three further police officers, PC Susan Tither, PC Varinder Sooch, and PC Stuart Hunter arrived at the pool. They were alarmed at the scene before them, fearful for ZH's safety. None of them spoke to the carers, nor the carers to them. PC Hunter said that they had to get him out because he was in danger, that the lifeguards were to move him to the shallow end and lift him out with the assistance of the police if needed. There was only a very brief discussion amongst the police about this, but they had to decide what they needed to do.

24. The Claimant was lifted out of the pool by the lifeguards and his arms taken hold of by two of the police officers. ZH was struggling or wriggling as he was being lifted up because, on the Defence case, he was reluctant to leave the pool though PC Tither conceded that the struggling may have been because of the forces being applied to him. PC Tither said they intended to lift ZH out of the pool, dry him, and hand him over to his carers.

25. PC Sooch said that the lifeguards were going to bring him to the shallow end and the police were then going to take him out of the pool. He could not however recall a conversation in which it was specifically said who was going to do what. The intention was to get him out of the water, but PC Sooch said that when they put their hands on him it was the point of no return. It was a very difficult task lifting him out of the water as he was heavy and PC Sooch said he slipped twice whilst they were seeking to lift him up, and that's how ZH ended on the floor on his back. Five officers, PC McKelvie, PC Colley, PC Hunter, PC Sooch and PC Tither all applied force to ZH's body. At one stage it is said that his struggling was such that he partially lifted PC Colley and PC McKelvie off the ground. PC Murray said that ZH attempted to bite PC Sooch.

26. Whilst ZH was being restrained both carers were trying to calm him down by showing him a banana and a lollipop but the police told them to move away. They had asked the police not to restrain the Claimant in the way that they were doing and emphasised that he was autistic and epileptic. PC Sooch conceded in cross-examination that there

was probably an opportunity for ZH to have got out of the pool voluntarily, and that there may have been other options, but they did not think of them at the time. They might have done, he said, if they had consulted the carers.

27. PC McKelvie said that whilst ZH was in the pool with the cordon of lifeguards he was still in a dangerous situation as he was in the water with his clothes on. He was not in danger but the situation was a dangerous situation. As ZH was struggling/trying to get back into the pool there was no other option but to restrain him. She and indeed all the other police officers were emphatic, that they felt they were placed in a situation in which they were given no alterative but to do as they did, at all times being concerned about ZH's safety and acting to protect him, and to a lesser extent the safety of others who might possibly be injured by him, were he, for example to run off around the pool and seek to barge through people in his way. PC McKelvie said it would have been more helpful for the carers to come up to offer advice rather than the police looking around the pool for help.

28. When asked whether ZH could have been left in the pool and allowed to come out of it in his own time with encouragement, PC McKelvie said that they were advised by the lifeguards, that ZH was to be taken out of the pool, and agreed. She accepted that the suggestion that the carers could have been barriers, and used the linking technique, could have been considered at the time if it had been suggested to them but it never was, either at the time or earlier.

29. The leg restraints which had been called for were brought by Sergeant Wallace, and he and PC Murray assisted in the restraint. It was only when two pairs of handcuffs and the leg restraints were applied that the application of force ceased. Mr Andrew, the swimming instructor, who was watching nearby said that during the course of the restraint, ZH lost control of his bowels. Mr Andrew said in evidence that he was very distressed by the process of the restraint and had formed the view that it would have been better to have let ZH go even if that meant him injuring himself.

30. After the handcuffs and restraints were applied the Claimant was taken out of the building via the emergency exit to the car park. He was then placed alone in a cage in the rear of a police van still in handcuffs, leg restraints, and soaking wet. He was very agitated and distressed. Whilst he was in the police van his carer/escort Ms Martine Harley arrived at the scene with further staff from the school. She was not allowed to get into the caged area of the van but was able to calm the Claimant by speaking to him so that the police officers removed his handcuffs and leg restraints at about 4.20pm. After he had been examined by the London Ambulance Service, who had already been called to the scene, he was permitted to leave with his carers, remaining highly distressed and too upset to change his clothes.

31. After ZH had been released Sergeant Wallace held what he described as a 'hot debrief' with the carers. It appears that this was a somewhat testy affair and that when Mr Badugu told him that the carers were not allowed to handle students it made him angry. The police attitude towards the carers was that they had been ineffectual and insufficient to deal with the problem and the carers view was that the police had over-reacted and used unnecessary restraint where time and patience would have been sufficient. Sergeant Wallace also spoke to GH, ZH's father later that day who was upset about the way that the police dealt with ZH, in particular about the restraints and handcuffs. Sargeant Wallace denied being defensive to GH.

32. The Claimant suffered consequential psychological trauma as a result of this experience and an exacerbation of his epileptic seizures. The agreed psychiatric evidence was that the Claimant was likely to have suffered from an acute level of psychological suffering during the index events, would not have understood what was happening, and was likely to have perceived his restraint as an unwarranted attack on his person. The use of considerable restraint would have been particularly distressing for him.

THE LEGAL FRAMEWORK

Trespass to the Person

33. The claims in assault and battery and false imprisonment are subject to the **Mental Capacity Act 2005** which came into force on 1 April 2007, save sections 5 and 6 which came into force on 1 October 2007. It is accepted by the Defence that once it is established that force was used upon the Claimant, or that he was imprisoned, the onus shifts to the Defendant to establish a lawful basis for the use of such force or imprisonment. To achieve this the Defendant has to demonstrate that his officers complied with the relevant provisions of the **Mental Capacity Act**. There is a dispute between the parties as to whether the common law defence of necessity is also applicable.

34. It is not sufficient for the Defence to establish simply that an officer acted honestly and in good faith. *R (Sessay) v South London & Maudsley NHS Foundation Trust* [2011] EWHC 2617 (Admin) para 47. Nor is there any general immunity from liability in trespass to the person claims such as exists in negligence claims, where there is a public policy based general immunity from liability relating to the investigation and suppression of crime. *Hill v Chief Constable of West Yorkshire Police* [1989] AC 53 and *Brooks v Commissioner of Police of the Metropolis* [2005 1 WLR 1495. The Claimant chose not to bring his claim in negligence, though it is likely that in circumstances such as these a duty would have been owed by the police, as would-be rescuers, to take reasonable steps not to exacerbate the situation. See *Costello v Chief Constable of Northumbria* [1999] ICR 752 at 765H-766C and 766G. As Miss Heather Williams QC on behalf of the Claimant submits, a claim in negligence would have added nothing to the existing causes of action and would have placed the burden of proof upon the Claimant rather than the police in respect of a greater number of issues.

35. **The Mental Capacity Act** sets out a number of pre-conditions which if satisfied permit certain acts to be undertaken in respect of those lacking mental capacity, without legal liability being incurred. Under **section 1(5)** an act done, or decision made under the Act for the person who lacks capacity must be done or made in his *best interests*. Under **section 1(6)** before the act is done, or the decision made, *regard* must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action. In determining a person's best interests the person making the determination must consider all the *relevant circumstances* of which he is aware and which it would be reasonable to regard as relevant. He must take into account, if it is practicable and appropriate to *consult them*, the views of anyone engaged in *caring* for such a person (**section 4(2)** and **section 4(7)**). **Section 5** deals with acts in connection with care or treatment, and excludes from liability acts done at a time when the person carrying

out that act reasonably believed that the individual lacked capacity in relation to the matter, and that it would be in his best interests for the act to be done.

36. **Section 6(2)** adds the requirement where restraint is carried out, that the Defendant *reasonably believes* it is *necessary* to do the act in order to prevent harm to the person lacking capacity, and **section 6(3)** requires that the act is a *proportionate response* to the likelihood of the person lacking capacity suffering harm, and the seriousness of that harm. The reasonable belief under both **section 5** and **section 6** has to be held when the act is being performed.

37. It was clear from the evidence that whilst Police Constables McKelvie and Hunter and Sergeant Wallace said that they were aware of **section 5** of the **Mental Capacity Act** at the time, and had it in mind, the other officers involved, Police Constables Colley, Tither, Sooch and Murray all agreed that they were not aware of the **Mental Capacity Act** power at the time and did not have it in mind. They say that they relied on the common law power of **necessity** to save life and limb. The Claimant contends that in such circumstances it is not possible for the police to satisfy the provisions of the **Mental Capacity Act** as if they were unaware of that Act they could not have positively believed the relevant pre-conditions for its exercise to have been satisfied, and believed themselves to have been acting for that reason. Miss Williams on behalf of the Claimant submits that that is an essential pre-requisite to the operation of the Act.

38. Miss Anne Studd, counsel on behalf of the Defendant, submits that lack of knowledge of the provisions of the Act is irrelevant as it is sufficient if the relevant factual issues are known to the officers at the time that they are acting. (See *Foster v Attard* [1986] 83 Cr AR 214). The position of the police, Miss Studd submits, can be no different to that of a neighbour who finds a confused elderly man wandering in his pyjamas in the road and takes him forcibly by the arm to return him to his home and his carer. If bruising were sustained during that act it cannot be right to say that the neighbour would be guilty of assault because he was not aware of the provisions of the **Mental Capacity Act 2005**.

39. Miss Williams relies on *Chapman v DPP* [1989] 89 Cr. App. R 193 for showing that a particular state of belief has to be held by the officer at the relevant time for the power to be exercised, such as in the power of arrest. It is, Miss Williams submits stretching credulity to accept that the officers who, on their own accounts were not aware of the **Mental Capacity Act**, nevertheless directed their minds to each of the statutory pre-conditions at the time of dealing with the incident.

40. Whilst it is correct that the officers have to have the prescribed state of mind at the material time under **sections 5 and 6**, it is not necessary in my judgment, for them to have in mind the specific sections, or indeed even the Act, at the material time. What they must reasonably believe at the material time are the facts which determine the applicability of the **Mental Capacity Act**. Thus, at the material time they need to believe that the Claimant lacked capacity to deal with and make decisions about his safety at the swimming pool, that when they carried out the acts that they did, they believed that the Claimant so lacked capacity, and that they believed that it was in the Claimant's best interests for them to act as they did. A belief that the situation created a need for them to act in order to protect the Claimant's safety and prevent him from severely injuring himself would in my judgment be sufficient to satisfy the Act,

provided of course that the belief was reasonable under sections 5 and 6 and a proportionate response under **section 6** of the Act. It is also necessary for the Police to have considered whether there might be a less restrictive way of dealing with the matter under **section 1(6)** and, if practicable and appropriate to consult the carers, to take into account their views. These are not only matters which they must have in mind when they carry out the acts of touching, grabbing or restraint but are matters which they must have had regard to before carrying out such acts.

41. Depending upon my findings of fact, it is therefore in my view possible for the police to have satisfied the conditions set out in **sections 5 and 6** of the **Mental Capacity Act 2005** even if some of their number were not aware of the terms of the Act itself, provided that they were aware, when acting, of the need to act when they did in order to protect the Claimant from serious injury and had consulted the carers, if practicable, to find out their views of the best way of dealing with the situation. It may be as Miss Studd submits, that it is unnecessary to consider the common law defence of necessity in view of these findings, but on the basis that that may be considered to be incorrect I shall also consider whether the common law defence of necessity is applicable in circumstances where the **Mental Capacity Act** applies.

42. For this common law defence to be available, the officer in question must believe at the time that he or she acted that it was necessary to do so in order to prevent death or serious injury. The Claimant submits that this defence does not apply as the best interests provisions of the **Mental Capacity Act** have replaced the common law defence of necessity where the **Mental Capacity Act** is relied upon. Miss Williams relies upon the case of *Sessay* where it was held that the Mental Health Act 1983 provided a comprehensive statutory regime to cover the area, and the broader common law defence of necessity would not be compliant with the requirements of Article 5 of the ECHR. By parity of reasoning, she submits, the same factors apply here. Alternatively, the Claimant submits, the defence would be inapplicable on the facts because the evidence did not indicate death or serious injury when restraint was applied, and further the defence would not apply if the Defendant was at fault in creating the crisis. (*Rigby v Chief Constable of Northamptonshire* [1985] 2 AER 985). The real point however, Miss Williams submits, is that if the common law defence was still to apply, the statutory safeguards built in to **section 5** of the **Mental Capacity Act** could simply be circumvented. That cannot have been Parliament's intention.

43. Miss Studd submits that the present case is different to that of *Sessay* where the Mental Health Act 1983 provided a procedural framework by which those who are mentally incapacitated could be detained. The **Mental Capacity Act** is however, she submits, very different in its character. Mr Justice Munby (as he then was) in *Re A (a child) (deprivation of liberty) re C (vulnerable adult) (deprivation of liberty)* [2010] EWHC 798 paras 74-75 considered that the doctrine of necessity did still exist when dealing with section 4A of the **Mental Capacity Act**.

44. For my part I am satisfied that where the provisions of the **Mental Capacity Act** apply, the common law defence of necessity has no application. The **Mental Capacity Act** requires not only the best interests test but also specific regard to whether there might be a less restrictive way of dealing with the matter before the act is done, and, an obligation, where practicable and appropriate to consult them, to take into account the views of the carers. It cannot have been the intention of Parliament

that the defence of necessity could override the provisions of the **Mental Capacity Act** which is specifically designed to provide specific and express pre-conditions for those dealing with people who lack capacity.

45. The **Disability Discrimination Act 1995** provides that it is unlawful for a public authority to discriminate against a disabled person in carrying out its functions. (Section 21B). The police officers were here undertaking a public, policing function. Where the use of force in accordance with the normal practice, policy or procedure of the public authority makes it unreasonably adverse for the disabled person to experience because of those disabilities, it is the duty of the public authority to take such steps as it is reasonable in all the circumstances of the case to take in order to change the practice, policy or procedure. (Section 21E(2)).

46. It is not disputed by the Defence that a duty to make reasonable adjustments to the normal practice, policy or procedure did arise but it is denied that any of the adjustments relied upon by the Claimant were either available or reasonable.

47. I gave leave for the Defence to rely upon the defence of justification under the **Disability Discrimination Act** sections 21D(3), 21D(4)(1) and 21D(5). The essence of this defence of justification is that the actions, as they stood, were necessary in order not to endanger the health or safety of any person including the disabled person. The acts of the public authority have to be a proportionate means of achieving a legitimate aim. (Section 21D(5)).

48. For an adjustment to be reasonable it does not have to be shown that it would have made a difference in the circumstances, it is sufficient if the Claimant establishes that there was a prospect of it having that effect. *Leeds Teaching Hospital NHS Trust v Foster* [2011] UKEAT/052/10 para 17.

49. The changes which amounted to reasonable adjustments for the police to have made in the circumstances are set out in paragraph 33 of the Amended Particulars of Claim. The Claimant asserts that they were as follows:

    i) "identifying, or at least taking reasonable steps to try and identify, with the Claimant's carers, the best means of communicating with the Claimant before attempting to do so and as the situation developed, then adjusting their usual means of communication accordingly;

    ii) identifying, or at least taking reasonable steps to try and identify, with the Claimant's carers before approaching him, a plan to best address the situation and then taking reasonable steps to implement that plan;

    iii) allowing the Claimant opportunities to communicate with his carers and receive reassurance from them, in particular when he had just come out of the pool and when he was shut alone in the police van;

    iv) at the outset, allowing the Claimant an opportunity to move away from the poolside at his own pace. He had not entered the water despite standing unrestrained near the edge for at least around 30 minutes prior to the officers' attendance. Following their arrival and excessive intervention he jumped into the water within minutes;

v) recognising that in the circumstances use of any force on the Claimant was an option of very last resort only to be deployed if all other options had been tried and failed and only then at the minimum level possible and in circumstances that were not duly oppressive for the Claimant;

vi) seeking, listening to and responding to advice from the Claimant's carers as the situation developed and keeping their approach to it under careful review, for example after it became readily apparent that using force on the Claimant only served to frighten and distress him and escalate the situation further;

vii) adopting alternative strategies to afford protection for the Claimant's safety (if and in so far as there was any risk of the same, which is not accepted) for example by the officers present forming a cordon to prevent him from re-entering the pool;

viii) prioritising the adoption of a calm, controlled and patient approach at all times in their dealings with the Claimant."

The Human Rights Act claims

Article 3 - … inhuman or degrading treatment

50. "Treatment" must attain "a minimum level of severity" to constitute inhuman or degrading treatment under Article 3. In considering the severity, all the circumstances, including the duration of the treatment, whether any physical or psychiatric injury was sustained, and the age, health and vulnerability of the victim must be taken into account. *Mayeka v Belgium* [2008] 46 EHRR 23, *Re E (a child)* [2009] 1 AC 536 HL.

51. The use of handcuffs in carrying out 'a legal arrest' or restraint, does not normally give rise to an infringement of Article 3 if their use does not entail the use of force, or public exposure, exceeding that which is reasonably considered necessary. Miss Studd submits that the circumstances in the case of *Archip v Romania* [2011] App. No. 49608/08 to which the Claimant refers, was an exceptional case because of the public humiliation of a disabled person. That was not applicable here where no injury was sustained and ZH was out of the public gaze.

Article 5 – right to liberty

52. The Article states that no-one shall be deprived of his liberty save in six specified cases, none of which apply to the Claimant's case. The question is therefore whether the Claimant suffered a "deprivation of liberty" within the meaning of Article 5(1).

53. Deprivation of liberty may take many forms and is not restricted to the classic case of the incarcerated prisoner. Thus it may apply to persons deprived of their liberty under curfew. *Secretary of State for the Home Department v JJ* [2008] 1AC 385.

54. The starting point in making the assessment must be the specific situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question. The distinction between a deprivation of, and restriction

upon, liberty is merely one of degree or intensity and not one of nature or substance. *HL v United Kingdom* [2005] 40 EHRR para 89, *Medvedyev v France* [2010] 51 EHRR 39 para 73.

55. A distinction must be made between a deprivation of liberty and a restriction of movement, which the Defence contends is what occurred here. The latter is not a breach of Article 5.

56. The Defendant contends that when assessing the range of factors in order to determine whether there has been a deprivation of liberty, the court must take into account the purpose of the restraint. If that purpose is for the benefit of the disabled person a breach of Article 5 is less likely to be found. The Defendant relies upon the dicta in the case of *Secretary of State for the Home Department v JJ* of Baroness Hale at paragraph 58. She there said:

> "It also appears that restrictions designed, at least in part, for the benefit of the person concerned are less likely to be considered a deprivation of liberty than restrictions designed for the protection of society. See *R (Secretary of State for the Home Department) v Mental Health Review Tribunal* [2002] 6 CCLR 319, paras 16-17 citing *Neilsen v Denmark* [1998] 11 EHRR 175 and *HM v Switzerland* [2002] 38 EHRR 314, *Davies v Secretary of State for the Home Department* [2004] EWHC 3113 (Admin)."

57. In *Surrey County Council v CA, LA MIMG and MEG* [2010] EWHC 785 (Fam) Mrs Justice Parker noted that 'purpose' does not figure in the list of factors to be evaluated in determining the concrete situation of the person concerned in the authorities, but stated that she was of the view that in the case before her it was permissible to look at the 'reasons' why each of the parties was living where they were.

58. The Defendant also relies upon the case of *Austin and another v Commission of Police for the Metropolis* [2009] 1 AC 564. In that case, which concerned the police "kettling" of demonstrators, Lord Hope considered the question of whether "purpose" was relevant. He said that if purpose was relevant "it must be to enable a balance to be struck between what the restriction seeks to achieve and the interests of the individual". Para 27. His conclusion, described by Lord Walker as "guarded" (para 43) was that a pragmatic approach should be taken and that the ambit given to Article 5 to measures of crowd control had to take into account the rights of the individual as well as the interests of the community.

59. Lord Walker considered that the purpose of confinement was generally relevant, not as to whether the threshold was crossed, but as to whether that confinement could be justified under Article 5(1)(a) to (f). Many of the cases relied upon by Lord Hope raised issues of express or implied consent to admission to a psychiatric ward or old people's home. He doubted the decision in *Neilsen*.

60. The remaining members of the House of Lords, Lord Scott, Lord Carswell and Lord Neuberger agreed with Lord Hope's speech. The case has now gone to Strasbourg and judgment is awaited.

61. The Claimant submits that "purpose" is not relevant as it is the effects upon the applicant of the measure in question, rather than the intentions of those imposing that measure. The cases of *Neilsen* and *HM v Switzerland* referred to by Baroness Hale in *JJ* are explained upon the basis of consent to the measure and are not authority for the broader principle that if the measure is for the benefit of the person concerned it is less likely to be regarded as a deprivation of liberty. (*HL v United Kingdom* [2005] 40 EHRR 32 at paragraph 93). Miss Williams submits that that case, where the court concluded that an autistic man admitted as an informal patient to a psychiatric hospital had suffered a deprivation of liberty despite the fact that the admission had been for his own benefit, would have been decided the other way if the purpose of his confinement had been taken into account. The problem with this submission however is that the case of *HL* was determined on the basis of the absence of procedural safeguards failing to protect against arbitrary deprivation of liberty on the grounds of necessity. The hospital's healthcare professionals had full control of the liberty and treatment of a vulnerable incapacitated individual on the basis of their own clinical assessment, as and when they considered fit without such procedural safeguards. (Paragraphs 121, 124).

62. Miss Williams further submits that the case of *Austin* can be distinguished as it was a case of public order and there is no public order justification within the exceptions to Article 5(1). Where however the court is dealing with a person of "unsound mind" such a justification is provided for by Article 5(1)(e). That justification, she submits, cannot be made out here when considering whether a deprivation of liberty occurred at all, rather than in order to ascertain whether one of the justifications was applicable. That would run counter to the structure of Article 5(1) (*Medvedyev*).

63. It is right to say that there is no reference to 'purpose' in Article 5 save in relation to the specific exceptions (a) to (f). The cases however clearly establish that all relevant factors relating to the applicant have to be considered. If the applicant has a need for measures to be taken in order to protect his own safety, such a need should be taken into account otherwise the court is not considering the full circumstances relating to the applicant when the ambit of Article 5(1) is being considered. The court is not therefore considering the matter from the point of view of the person carrying out the measure, but from the point of view of the applicant who needs the measure to be carried out. This, it seems to me, is a similar approach to that adopted by Mrs Justice Parker when taking into account the "reasons" for the applicants before her living where they did.

64. There may be policy reasons why the ambit of Article 5 should only involve consideration of the actual effect upon the applicant, so that the scope of Article 5 is not unnecessarily diminished by "purpose" or "need". The matter was not argued in depth before me however, and I am only able to express a tentative view on the basis of the material before me. On that material I conclude that the purpose of, or the need for a measure to be taken on the part of an applicant is one of the factors which should be taken into account in considering whether there has been an infringement of Article 5. It seems to me that if the consent of the applicant is relevant, which is not part of the concrete effect upon him, then need can also be said to be relevant.

Article 8 – the right to respect for private life

65. If the restraint interferes with the applicant's private life Article 8 is engaged. The issues that would then arise would be under Article 8(2), namely as to whether such interference was "in accordance with the law" and "is necessary in a democratic society in the interests of… public safety for the protection of health or for the protection of the rights and freedoms of others."

66. There is in any event a requirement that it would not be in accordance with the law if it did not comply with domestic law nor would it be necessary in a democratic society if it went beyond what was strictly necessary for achieving the legitimate aim relied upon, in other words it was not proportionate.

THE MAIN ISSUES OF FACT AND THEIR RESOLUTION

67. When making the findings of fact I bear in mind Miss Studd's submission that the court must avoid hindsight and at all times be aware of the emotive nature of this case. The police were faced with a difficult and unusual situation in which a disabled young man was in a position of potential danger. Their responses to what became a fast moving situation must be judged accordingly. The court should also bear in mind that ZH was on this day displaying behaviour known to the carers which had been exhibited in the past. Those previously exhibited risks: jumping into water, or wanting to stay in the water, or go back in necessitating physical interventions to prevent that, were the very risks the Police urgently perceived might then occur that day which explains, Miss Studd submits, why they acted as they did.

68. I bear these introductory submissions in mind as well as the helpful submissions made in writing and orally by both counsel.

69. I deal with the factual issues under four headings, firstly ZH's entry into the pool after the arrival of the police, secondly the time when he was in the pool, thirdly when he was removed from the pool and restrained at the poolside and fourthly when he was in the police van. I have adopted, in essence, the issues raised by Miss Williams QC in her closing submissions.

ZH's entry into the water

(a) Were PC McKelvie and PC Colley faced with an emergency on their arrival at the pool which prevented them from obtaining advice and information from Mr Badugu before ZH entered the water.

Both police officers accepted in evidence that it would have been appropriate to consult the carers but said that they did not have the time to do so as they perceived an immediate risk that ZH was about to jump into the water. In effect, the Defence submits, events overtook them.

70. ZH had in fact been standing by the pool for at least 40 minutes between 14.50 and 15.30 hours when the police arrived. It is probable that Mr Hartland told PC McKelvie in his conversation with her, as he says he did, that ZH had been standing there for a significant period of time. There remained the risk that he would jump into the water at any given time, but his presence and demeanour by the pool did not in

itself suggest that he was going to do so imminently at that particular time, any more than he had been in the last 40 minutes. Had Mr Badugu been consulted he would have been able to inform the police that it is not uncommon for an autistic person to become "stuck" in one place for a considerable period of time. That is no doubt why Mr Badugu had told Mr Hartland that "the boy needed time".

71. The officers could also see that there were several lifeguards nearby looking after ZH's safety, should he have gone into the pool. He was well within his depth at the point where he was standing.

72. Mr Badugu was standing in the corridor within sight and sound of ZH. PC Colley was able to speak to Mr Badugu and there is no reason why PC McKelvie should not have done so as well, whilst at the same time, as PC Colley did, maintaining an eye on ZH.

73. When PCs McKelvie and Colley arrived at the pool the CAD message had informed them that there was a disabled male trying to get into the pool and becoming aggressive. PC McKelvie states in her witness statement that her understanding was therefore they needed to calm down the aggressive male. (paragraph 3). She spoke to the lifeguard who she said did not give her much information other than Z's name and that he had a carer. Mr Hartland in his witness statement says that he spoke to the female officers and said that ZH had been by the pool for about an hour, it looked like he would jump in, the carer was not helping, and he did not know what else to do. (paragraph 16).

74. Mr Hartland made it clear in his evidence that he considered that he had had little help from the carer, who he felt was essentially ignoring ZH, doing no more than waving a bag of crisps at him, trying to distract him. He also referred to the carer sitting on the bench in the corridor and eating the crisps at a later time. He had said to the carer that he needed to do something to remove ZH from the pool or he would call the police and was clearly not satisfied with the answer that the carers were coming back from the school and they could deal with it.

75. It was clear from Mr Hartland's evidence that he felt exasperated at the apparent inaction of the carer. It is probable that his sense of exasperation was communicated to the police when they arrived. The feeling that the carer was not doing enough was not only that of Mr Hartland; it was shared by Mrs Burton and it appears, other members of the pool staff before the police arrived.

76. PC Colley on her arrival describes the carers (though there was in fact only one there at the time) leaning against the wall and not doing anything at all, not trying to speak to ZH or communicate with him in any other way. Her assessment was therefore that the only way ZH would be moved away from the side of the pool and away from danger was if she took action herself ; "no-one was taking control of the situation: PC McKelvie and I therefore had to do something." Paragraph 9, PC Colley witness statement.

77. PC McKelvie said that she did not see the carers, and clearly also felt that the police had to take control of the situation. When giving evidence she said in cross-examination that when police were called they had to be seen to be doing something. Having heard the evidence I am quite satisfied that it was this belief of PC Colley and

PC McKelvie, that no-one was taking control and that the police had to do so, and be seen to be doing so, which was the catalyst for them moving towards ZH and acting as they did. I fully accept that both PC Colley and PC McKelvie genuinely believed that ZH was in potential danger but I do not accept that they considered the risk of him jumping in to be so imminent, and such an emergency, that they had to act, in PC McKelvie's case before speaking to the carer, and in PC Colley's case before seeking to obtain fuller information from him. It was the need for the police to take control of the situation and be seen to be doing so which was uppermost in their minds.

78. I am also satisfied that had the police taken the opportunity to speak to Mr Badugu and seek his advice, he would have informed them that ZH was autistic, that he had become "stuck" by the pool as sometimes happened to autistic children, that he needed time, and, as Ms Nabulla had told Mrs Burton, that if they touched him he would jump in. I am satisfied that Mr Badugu would have given this information had he been asked, as he was well aware of all these matters, conscious of them and knew their relevance and importance. His diffident manner and distance from ZH may have given the impression of negligent inaction as Mr Hartland thought, but his approach to the problem, which he had taken advisedly with his knowledge of autistic children was an appropriate and proper approach to take. Mr Kavanagh, the Deputy Headmaster of the school, who impressed me as a knowledgeable, experienced and skilful teacher, told me that the course of action which Mr Badugu took was an appropriate course of action for an autistic child who had become "stuck" in those circumstances. That does not explain however, why Mr Badugu did not, as the member of school staff left in charge of ZH, go up to the police and inform them of what he was doing and why he was doing it. Miss Studd submitted to me that the fact that the pool staff called the police in itself showed that they considered that ZH was in immediate danger. I am not however satisfied that this is so. Mr Hartland's reason for calling the police was at least as much because the pool had a swim safety policy requiring somebody who could not swim to be accompanied by an adult, and that something needed to be done to remove the fully clothed ZH from the edge of the pool. His reference to ZH becoming "aggressive" in his call to the police was not a reference to an immediate risk of ZH jumping in but an apprehension about risks to others. He said in evidence that he had not at the outset been intending to call the police, but the Police Community Service officer: he didn't at that time think it was a real emergency.

79. Miss Studd also submitted to me that the fact that both PC Colley and PC McKelvie acted at the same time almost in unison, also demonstrated that they felt they were faced with an emergency and had no choice but to act. This submission is not borne out by the facts as a consideration of the next issue on the evidence demonstrates.

(b) What was the immediate cause of ZH entering the pool?

PC McKelvie, having decided to speak to ZH herself without having spoken to the carers, went over to ZH said "Hello Z, I'm Hayley" and then touched him gently on the back to see if he would respond. It was after that touch that ZH jumped into the pool and only when he was doing so after that touch that PC Colley and PC McKelvie acted in unison to try and grab him to prevent him going into the water. Had PC McKelvie not touched ZH there is no reason to believe that he would have entered the water at that time. Neither his movements nor position indicated that, in the absence of such a touch, he was about to jump in and I see no reason to believe that the

touching by a stranger, an action often inimical to an autistic person, was simply a coincidence.

80. Even if PC McKelvie had not touched ZH, which I am satisfied on her own evidence that she did, the presence of two uniformed police officers coming up towards him and standing close, on either side of him was probably in itself sufficient to cause ZH to jump into the pool.

81. It was very unfortunate that by their actions PC McKelvie and PC Colley brought about the very thing which they were seeking to prevent, namely ZH's entry into the pool. Had they taken the time and opportunity to speak to Mr Bagudu and obtain information and advice from him before acting as they did, the probability is that ZH would not then have jumped into the pool. How the situation would in fact have resolved itself had they not acted as they did, is not certain but he had at one stage moved away from the pool edge of his own volition on Mrs Burton's evidence. I will deal with the role of the carers later in this judgment.

The time when ZH was in the water

(c) the level of danger ZH was in whilst he was in the water.

82. ZH was not able to swim. His condition meant that he was unaware of the dangers of the water or the difference between the deep and shallow end. When he entered the pool he was fully clothed, including an outdoor jacket. He was therefore clearly in danger in the water, though the degree of danger depended upon the presence of the lifeguards who went in on the instruction of PC Colley, and his position in the pool. When he entered the water it was up to about chest level. But he moved towards the deep end and had to be prevented from going further in that direction by the three lifeguards who had jumped in. His jacket also started to move over his head and was removed by the lifeguards. Thereafter, with the lifeguards present, the danger he was in was not substantial, though still present, and reduced when he was taken to the shallow end where the water came up to about his knees.

83. With the lifeguards present in the pool there was no appreciable danger of the Claimant drowning, and the risk to his safety significantly diminished in the shallow end with lifeguards preventing him from accessing the deep end. I am not satisfied on the evidence before me that his head went under at any stage, although Mr Hartland and PC Tither suggested that it did. None of the other witnesses suggested that this occurred and I preferred their evidence on this issue.

84. It is not perhaps surprising that at some time after the entry of the lifeguards into the pool PC McKelvie felt able to send a message back to control at 15.36 stating that ZH was now in the pool but "not in danger/drowning".

(d) What was ZH's behaviour in the pool?

When he first entered the pool ZH was standing with the water up to about his chest level splashing his arms down onto the surface of the water. Most of the witnesses consider that he was exhibiting pleasure in being in the water and I have no doubt that this was so. Given his lack of appreciation of the dangers of the water and the fact that he was not able to swim it would not in the circumstances be surprising if he

resisted the attempts of the lifeguards to move him toward the safer area of the shallow end. PC McKelvie thought that he was in the pool between 5-10 minutes in all and the timings on the CAD record are consistent with this.

85. The process of preventing his entry into the deeper end and guiding him towards the shallow end took some minutes. Mr Hartland says that when he approached the Claimant, the Claimant pushed him, or lashed out at him and he was supported in this account by PC Tither. PC Hunter and PC Sooch who were also watching the Claimant during this period, indeed were "fixated" by him, did not notice such an obvious response by the Claimant and I am not satisfied on the evidence that any lashing out did in fact occur. It is probable however that the Claimant, given his pleasure at being in the water and his dislike at being touched, would have sought to push away someone who approached him, seeking to touch him or take hold of him. Mr Hartland's account is coloured by the fact that he had wrongly reported to the police that ZH was being aggressive before he entered the pool, when on his own evidence that was not the case. He also described Mr Badugu as eating the crisps as well as waving them at the Claimant in order to distract him, though no other witness described seeing this and Mr Badugu denied doing it. I have doubts about the accuracy of Mr Hartland's account on these issues.

86. It would not be surprising if ZH responded more actively to being physically grabbed by three lifeguards and moved toward the shallow end, though even here the evidence as a whole does not support ZH being aggressive towards the lifeguards. PC Colley said that she did not see him thrashing about or being aggressive, as did PC McKelvie, and PC Sooch said that he was wriggling from side to side but not lashing out. PC Hunter did not see him trying to hit the lifeguards or lashing out or thrashing out at them. Furthermore Miss Namballa said that ZH responded anxiously when the lifeguards took hold of him but did not seek to strike them and both Mr Maslach and Mrs Burton did not describe him as being aggressive.

87. On the evidence as a whole I am satisfied that ZH did seek to push away Mr Hartland when he first approached him, and that when he was physically grabbed by the three lifeguards he resisted by moving so as to escape from their grasp, but could not properly be described as being aggressive towards them. The debate between some of the witnesses as to whether ZH's actions could be described as "struggling" or mere "wriggling" is no more than different people's descriptions of viewing the same event. As I have indicated, for my part, I am satisfied on the evidence as a whole that whilst trying to escape from the clutches of the lifeguards ZH's actions could not properly be described as aggressive.

> (e) The opportunity for the police to seek advice or information from the carers whilst ZH was in the water.

ZH was in the pool for not less than 5 minutes and perhaps as much as 10 minutes. During this time at 15.36 PC McKelvie had been able to send her message to control reporting that he was not in danger/drowning. There were during the time that ZH was in the pool, five officers at the poolside, and I am satisfied that both Miss Namballa and Mr Badugu were also there. They described themselves as being at the poolside trying to encourage ZH to come out, Miss Namballa with ZH's home bag to encourage him to appreciate that it was time to go home. This account was supported by Mr Maslach and PCs Sooch, Hunter and Colley all confirmed their presence.

Police Constables Hunter and Colley described the carers trying to communicate with ZH whilst he was in the pool by waving a lollipop or confectionery at him. Indeed PC Colley describes speaking to the carers as she was walking down to the shallow end as were they. They told her she said, that he was behaving the way he was because he was autistic but added nothing more.

88. This certainly confirms the presence of the carers at the poolside while ZH was in the pool and I am satisfied that when PC McKelvie and PC Tither say that they did not notice them, that was not because they were not present.

89. As to whether or not PC Colley spoke to the carers while ZH was in the pool, which they deny, Miss Williams submits that such a conversation is unlikely when, had they been approached they would have given advice as to what they considered should be done with their knowledge of ZH and their expertise, rather than just repeating that he was autistic. Miss Studd submits that the conversation has the ring of truth about it when compared with what the carers said to Mrs Burton and Mr Hartland, namely that his behaviour was based upon the fact that he was autistic. What was said earlier to the lifeguards in different circumstances however does not bear out what might have been said at the poolside while ZH was in the pool and I am doubtful having heard the evidence that such a conversation took place. If it did, it was not in the context of PC Colley seeking to obtain advice from them or asking what should be done, or otherwise formulating a plan for assisting or encouraging ZH to come out of the pool of his own volition.

90. I am satisfied on the evidence that there was ample opportunity for the police to have sought the advice and assistance of the carers as to the best way of safely removing ZH from the pool during the 5-10 minutes he was in the pool. They did not do so. Indeed it was unclear on the evidence before me as to which police officer was in fact in charge until Sargeant Wallace arrived. PC McKelvie closely followed by PC Colley made the first move toward ZH before he entered the pool; PC Colley instructed the lifeguards to go into the pool after ZH had jumped in; but no one person took charge of the police activity whilst ZH was in the pool. Miss Studd submitted to me that because of the intensity of their concern for his safety the police were fixated on ZH whilst he was at the pool; the police were in uniform and easily noticeable and could have been approached by the carers. Furthermore there was no need to speak to the carers and formulate a plan as there was no evidence that the police intended to restrain ZH in advance of him coming out of the water. In any event Miss Studd submitted, the carers gave no advice to the police when they could have done so.

91. It can be seen from the above that the Defence do not essentially challenge that the opportunity for the police to seek the advice and assistance of the carers, whilst ZH was in the pool, was available to them, but submit that there was no need or duty to speak to them in order to formulate any plan, as the intention of the police during that time was not to restrain him, but to lift him out of the pool, and then dry him off and hand him over to his carers.

92. The evidence of PC Hunter however satisfied me that the police did have a brief discussion in order to determine what they were going to do. The essence of this discussion, and hence plan, was that the lifeguards were to move him to the shallow end and lift him out with the assistance of the police if necessary. PC Sooch's evidence confirmed this and although he could not remember the conversation it was

the case, he said, that the lifeguards were going to bring ZH to the shallow end and the police were then going to take him out of the pool. PC Tither also referred to speaking to PC McKelvie in order to discuss what course of action should be taken (para 5 witness statement) but gave no further detail upon it in evidence.

93. It may not have been expressly stated that ZH was to be restrained, but as PC Sooch said in evidence, when the police put their hands on him the point of no return had been reached. The inevitability of restraint, with three lifeguards and two police officers manhandling ZH out of the pool was clear to foresee. His predictable struggle when being so lifted out of the water was met with forcible restraint, whether or not hastened by PC Sooch slipping whilst they were seeking to lift him up, thereby causing ZH to end up on his back on the floor.

94. The opportunity to ascertain, by speaking to the carers while ZH was in the pool, the best and safest way of removing him from it was not taken. Instead, the police formulated their own plan to remove him from the pool with the assistance of the lifeguards and in the absence of any advice or information from the carers. They did not therefore inform themselves by speaking to the carers that ZH disliked being touched by or approached by strangers and that a calm and patient approach had to be used towards him.

95. Miss Williams submits that the police could and should have realised that this was possible as the water came up to a point between ZH's knees and thighs when he was standing in the shallow end, there were three lifeguards there, the pool had been cleared of other swimmers, there were three carers present in the area of the shallow end to help encourage him out, and his manner and mood permitted that to happen. Miss Studd submits that on the facts this was not feasible, as ZH plainly did not want to come out of the water, he had resisted the lifeguards and he had declined the opportunity he had been given to come out of the steps. The evidence as to his previous conduct from Mr Kavanagh and the school records show that it could not have been safe or practicable to leave him to come out of the pool by himself.

> (f) Was ZH encouraged to emerge from the pool of his own volition before he was lifted out?

96. The evidence is conflicting upon this issue. PC McKelvie said that the lifeguards had tried to put ZH's legs on the steps and push his body up so that he could grab the railings but that ZH would not do so, and PCs Tither and Hunter say that they recall the lifeguards trying to take ZH up the steps. The latter two however do not refer to this in either of their EAB accounts or their witness statements.

97. Mr Maslach said that he had a vague memory of the lifeguards trying to get ZH up the steps; Mr Andrew said attempts were made to get ZH to go to the steps but he didn't want to get out. PC Colley said that she did not see the lifeguards trying to bring ZH up by the steps, nor did Mr Hartland. PC Sooch said that as soon as ZH was brought to the shallow end he was held up the lifeguards and lifted up by the police. It was my impression having heard the evidence that ZH was lifted up for removal from the pool with the assistance of the police almost as soon as the lifeguards had brought him to the shallow end. Whilst he may have been effectively shown the steps he was at no time released from the grasp of the lifeguards and hence the opportunity that he was given to leave the pool of his own volition, if any, was brief and limited.

98. Miss Studd submitted that when the Claimant was lifted from the pool by the lifeguards and police, the police initially tried to calm him, and relied upon the report from Ms Sturrock after the event (E/110). The fact that they sought to do this, Miss Studd submitted, demonstrated that they had no plan to restrain ZH. For my part I am not satisfied that there was any attempt to calm him before he was restrained. There is some evidence from Mr Hartland that the police were trying to calm him down whilst restraining him but his evidence, like the rest of the evidence, is clear that once the police had helped to lift him out of the pool they restrained him immediately on the ground. Whether PC Sooch slipped or not, ZH certainly ended on the floor on his back and was restrained immediately on being lifted out of the water.

> (g) Would it have been possible for ZH to have been encouraged to leave the pool by himself without being lifted out?

99. Miss Williams submits that the police could and should have realised that this was possible as the water came up to a point between ZH's knees and thighs when he was standing in the shallow end, there were three lifeguards there, the pool had been cleared of other swimmers, there were three carers present in the area of the shallow end to help encourage him out, and his manner and mood permitted that to happen. Miss Studd submits that on the facts this was not feasible, as ZH plainly did not want to come out of the water, he had resisted the lifeguards and he had declined the opportunity he had been given to come out via the steps. The evidence as to his previous conduct, she submits, from Mr Kavanagh and the school records show that it could not have been safe or practicable to leave him to come out of the pool by himself.

100. I have already accepted that ZH was not being aggressive to the lifeguards, albeit seeking to free himself from their grasp. Whilst he was bodily moved to the shallow end, I am satisfied that the real struggle only commenced when he was lifted out of the water by the lifeguards and taken hold of by two of the police officers. The evidence of PC Colley, PC Sooch and Mr Maslach all support this conclusion.

101. It was Mrs Burton's perception that encouraging ZH to come out under his own steam might have been worth a try, as she pointed out that a lot of his body was out of the water. PC Hunter said that it was desirable if he would come out under his own steam and said that he was surrounded by lifeguards. He agreed that it was safe to allow him some time in the shallow end to see if he could be encouraged to come out. PC Sooch agreed that there may have been other options and that if he had consulted with the carers other options may have presented themselves to him and the other police officers.

102. There was in my judgment the opportunity for the Claimant to be released by the lifeguards in the shallow end so that he could stand comfortably and safely in the vicinity of the steps. The lifeguards could have formed the same cordon as they had formed to prevent him from going into the deep end, to stop him leaving the shallow end. By this time there were three carers present, Ms Namballa, Mr Badugu and Mr Maslach and they could have been on the pool side at the shallow end seeking to encourage ZH out of the water by use of his bag, things to eat or other familiar objects. It is not known whether such an approach would have worked in the circumstances, but it may have done and was a better option than the use of direct force by the police upon ZH, which, to an epileptic and autistic, presented the risk of

more damage than simply allowing him to try and come out of the pool by himself. ZH's mood and manner at that time before he had been restrained, the shallow depth of the water, the presence of the lifeguards and the presence of the carers made it possible and appropriate for ZH to be given the opportunity to come out of the pool by himself.

103. **When ZH was removed from the pool**

(h) What were the options open to the police after ZH was on the poolside?

There is no doubt that ZH was struggling when he was lifted bodily out of the pool and taken hold of by the police officers as well as the lifeguards. Certainly when he was put on his back and force applied to him it was likely, particularly in view of his autistic condition, that he would struggle hard to free himself. Miss Studd submitted that the police could not let go of a distressed and agitated, severely autistic boy, with the risk of injuring himself by going back into the pool or risking injury to those trying to rescue him, or risking an accident when he was out of the pool by a fall or a collision. Any return to the water could have been at the deep end where he would have been in danger. He might have barged through any barrier or cordon of lifeguards and again put himself and others at risk. Hence once restraint had started the police could not let go.

104. I accept that at this point it would have been difficult for the police to have released their grip upon him save, as I suggested during the course of evidence, by one officer releasing his grip at a time. This could in itself have caused difficulties but the continued application of significant force to an autistic and epileptic young man carried with it considerable risks. If releasing the grip and ceasing to restrain was not successful and, for example, ZH had re-entered the pool, a different procedure would have had to have been followed, perhaps involving the lifeguards escorting ZH to the shallow end once again and propelling him up the steps into the hands of the carers.

105. I accept the evidence of the police that a young man 1.7metres tall and 93 kilograms in weight could, when struggling hard to escape restraint, be able to lift, albeit not completely off the ground, part of the bodies of the women police officers during the struggle. ZH did not however suffer any direct physical injuries nor did any of the police, which suggests that the control and restraint were carried out without excess force and that ZH's struggling was effectively restrained, or that he was not violent in his struggling.

106. It was certainly foreseeable that there was a risk of injury to ZH after he had been lifted from the pool and was being restrained, and to a lesser extent to one of the police officers either from a limb, or from being knocked into the pool. I am also conscious of the fact that some of the police may well have been fearful at the time of being knocked into the water during the struggle, which even in the shallow end might have been alarming to those who were unable to swim. I do not however consider that even at this stage, and certainly not before, there was a reasonably foreseeable risk of serious injury to the police, the lifeguards or members of the public. The public had been cleared from the pool, and the numbers of police and lifeguards and carers were sufficient to deal with the situation without a risk of severe injury occurring. If ZH had managed to find his way back into the pool it may well be that the use of force in restraint of ZH would have had to have been used on him as

a last resort, once all other attempts which properly took into account his condition had been made, but in those circumstances there is no reason to suppose a greater risk of severe injury than there was in the events which actually transpired.

107. Had the earlier options of allowing time for the carers to attend and approach ZH before he entered the pool, or allowing him time to come out of the pool after he had jumped in, been permitted, there may well have been no need for restraint, and the risk of injury which that carried with it, may well have been obviated. After the restraint commenced there were few options open to the police but with the carers present and urging them to cease restraint they could have attempted that and allowed the carers to take over. In fact what happened was that the restraint continued with, for example, PC Murray shouting loud clear commands to ZH, a course of action quite inappropriate for his condition. Sergeant Wallace also spoke loudly to ZH because he said, he was screeching, but altered his approach to try to communicate with him by varying his tone when Miss Namballa shouted at him during the restraint that ZH was autistic. He should have learned that from his colleagues, before he jointed in with the restraint.

Restraint in the police van

108. I am satisfied that the paramedic's report referring to ZH being "v.agitated, v.upset, v.frightened" is accurate. The evidence of PCs McKelvie and Sooch satisfy me that he was crying by the time he was taken from the building. He was also soaking wet when he was placed in the police van on what was a relatively cold day.

109. PC Murray said that he and Sergeant Wallace discussed which was the most appropriate way to take the Claimant but could not recall what other alternatives were discussed. Sargeant Wallace said that he did not discuss any alternatives to putting ZH in the van, which was closest to where they were to provide a safe haven. To go to another room in the pool area would have involved going round the pool involving water, and greater danger, he said. PC Murray also referred to obstacles in the way of taking the Claimant to a room within the pool area.

110. The Defence case was that the police van was out of the public gaze and as good a place as any to leave the Claimant. It was not possible to take the restraints off him, Sergeant Wallace said, as the police could not permit ZH to be running free in the area, in a wet agitated, and distressed condition. Miss Harley was able to calm ZH within a short while and this demonstrated that had the carers been engaged with the police, the police would have been receptive.

111. There is no evidence as to precisely what rooms were available in the swimming baths, though there clearly were rooms in the building. The Claimant would have been just as secure whilst restrained in the warmth and cover of a room within the building but that option was not considered by the police. Once ZH had the handcuffs and leg restraints put on, the task of taking him from the pool was not in my judgment a difficult one. He was by that time readily controlled and directed by the police as his easy passage out to the police van demonstrated.

112. I accept that Miss Harley was permitted to talk to the Claimant as soon as she arrived, though I accept her evidence that when she said to the police that ZH did not need to

be restrained as he was autistic, a woman police officer told her that she didn't know as she had not been there.

LIABILITY

113. This action has been brought solely against the police but the Defendant has made allegations against the school staff in its defence. No allegation is made against the lifeguards. The role played by the school, the carers and the lifeguards has inevitably been considered during the course of this judgment as these parties influenced or contributed to the events which occurred. Criticisms of the school or its staff in respect of events which transpired before the day in question when the police were called are not relevant to the liability of the police, though the role of the carers on the day, and how it influenced what the police did and how they responded, is relevant.

Trespass

114. i) Assault and Battery

Each application of force, whether by touching, taking hold of or restraining needs to be considered.

a) Force applied to ZH before he jumped into the pool

I have found that PC McKelvie went up to ZH, before speaking to any carer, and touched him gently on the back. Shortly after this, as ZH was starting to jump into the pool, PC McKelvie and PC Colley each tried to take hold of an arm to prevent this.

115. Such applications of force without consent, as they were, constitute assault and battery, subject to the application of the **Mental Capacity Act** 2005. If the preconditions there set out are satisfied no liability is incurred by the Defendant in relation to the acts of his officers.

116. There is no doubt that the officers reasonably believed that ZH lacked capacity and that he was suffering from that lack of capacity at the material time. The evidence was clear that this would have been apparent to anyone who was observing and hearing him at the poolside.

117. For section 5(1)(b)(ii) to apply, the officers, when they touched ZH, must reasonably have believed that it was in his best interests for them to do so. To make the determination they had to consider all the relevant circumstances and had to take into account, if practicable and appropriate to consult them, the views of the carers. (Section 4(2) and section 4(7)).

118. Section 6 imposes limitations to section 5, in that where an act is intended to restrain a person who lacks capacity, the person carrying out the act must reasonably believe it is necessary to do so in order to prevent harm and the act must be a proportionate response to the likelihood of the suffering of harm and the seriousness of that harm. Section 6(1)(2)(3).

119. I am clear in my conclusion that the Defence has failed to satisfy the preconditions under the **Mental Capacity Act** 2005. Their task was without doubt a difficult one;

they arrived at the pool in the expectation from the message that they had received that they were to be faced with an aggressive disabled male; they were in fact faced with a disabled young man looking as if he might enter the pool fully clothed at any moment with no carer apparently taking control of the situation. But these first impressions were not in fact true. ZH was not and had not at any stage been aggressive before he went into the pool; he had been present beside the pool for some 40 minutes without jumping in and had become "stuck" there as can occur in the case of autistic children; the carer was several feet away for a reason, namely to ensure that ZH was not crowded into jumping into the pool.

120. What was needed from the police on their arrival was a calm assessment of the situation so as to ensure that they were as fully informed as the circumstances permitted before taking action. Had they been so informed, as they could have been by speaking to Mr Badugu, they would have learned that they must not touch ZH or go right up to him as these actions would be the most likely to bring about that which they sought to avoid, namely ZH jumping into the pool.

121. A calm and careful assessment was required from them in particular because they were not summonsed to deal with a crime, but with a disabled young man trying to get into a swimming pool. By moving forward and touching ZH before having consulted at all with the carers, PC McKelvie had not considered first all relevant circumstances. In particular she had not consulted the carer, Mr Badugu, even though he was a matter of feet away and available to speak to, as PC Colley demonstrated. It was both practicable and appropriate to consult him in the circumstances and the failure to do so at all in the case of PC McKelvie, or adequately in the case of PC Colley resulted in the very thing which they were trying to prevent, namely ZH jumping into the pool. The fact that Mr Badugu may have had a duty as the carer in charge of ZH, to explain to the police what he was doing and why he was doing it, and inform them of what needed to be done given ZH's condition, does not detract from the obligations placed upon the police by the MCA, even if Mr Badugu was in breach of his duty. It was the police who had taken control of the situation and it was they who had to comply with the MCA before, and when, acting as they did.

122. I am entirely satisfied that both PC McKelvie and PC Colley considered that ZH was in potential danger and that they were, in part, acting to protect him. I am not however satisfied that any belief that there was an emergency which required them to act before consulting the carers was a reasonable belief. PC Colley considered that no-one was taking control of the situation and PC McKelvie said that once called the officers had to be seen to being doing something. There is no evidence to suggest that ZH was any more likely to jump into the pool at that moment than he had been for the previous 40 minutes until he was approached and touched by PC McKelvie. It was that action which caused the emergency which PC McKelvie and PC Colley then tried to prevent by grabbing him to stop him from entering the pool. A calm discussion with Mr Badugu would have informed them of the particular problems relating to autistic children, that to touch him or go right up to him were strongly inadvisable and help from qualified school staff was on its way.

123. In the circumstances, however genuine their action, neither PC McKelvie nor PC Colley could reasonably have believed that they were acting in ZH's best interests when the matter is judged objectively as I am satisfied it must be. Nor, were their

actions a proportionate response to the likelihood of ZH suffering harm and the seriousness of that harm at the time that they acted.

124. I have already determined that the common law power of necessity is not available where the **Mental Capacity Act** 2005 applies. If however I am wrong in that view I would hold that the defence of necessity has not been made out in the circumstances of this case. Moving forward and touching ZH without discussing the wisdom of their actions was probably a direct cause of ZH jumping into the water. In these circumstances the defence of necessity is not available nor, as it was not an emergency situation, as opposed to one of potential danger, was their action a necessary one at that time. Were therefore the defence of necessity to be available it would not be made out in the circumstances of this case.

125.

b) Removal of ZH from the pool

The decision to lift ZH from the pool was made without any consultation with the carers. By this time Ms Naballa and Mr Maslach were present as well as Mr Badugu. As a consequence there was a failure to give ZH an opportunity to leave the pool by himself without being lifted out and restrained. By failing to consult the carers the police failed to understand the potentially serious consequences of applying force and restraint to ZH. They knew that he was autistic without either knowing or discovering what that meant and they knew that he was epileptic. Physical removal from the pool followed by forceable physical restraint should have been the last resort for somebody who they knew to be autistic and epileptic. The failure to consult with the carers whilst ZH was in the pool was unreasonable.

126. In the circumstances I am not satisfied that the Defence has established that the officers reasonably believed that it was in ZH's best interests to remove him from the pool when they did, or in the manner that they did.

127. Such action, without full information and consultation with the carers was neither necessary nor proportionate. The defence of necessity, even if it had been available, is not satisfied. Firstly the police were responsible for ZH entering the water when he did and secondly it was not necessary for him to be removed physically from the pool rather than first being given the opportunity to leave the shallow end by himself surrounded by lifeguards with carers waiting to assist him on the poolside.

128.

c) Restraint of ZH on the poolside

Once the police were locked into the physical removal of ZH from the pool carrying with it the probability of struggle and restraint the options available to them were limited. Even then however they could have stepped back, one by one, to give the carers the opportunity to calm him and help him. The carers were making it clear that the degree of force being used was wholly wrong and had consultation with the carers taken place either before he went into the pool or whilst he was in the pool, the police would have discovered that such forceable physical restraint would have been potentially damaging to him given his condition of autism and epilepsy.

129. I am not satisfied on the evidence that the police believed at this stage that the restraint was for the benefit of ZH. They were simply caught up in a process which they had started, continued to be involved in and felt unable to stop or control. In any event even if the police believed it was in ZH's best interests to be out of the water; and not able to return to it, thereby requiring or justifying the use of forcible restraint as Miss Studd submits, it cannot have been a reasonable belief that that level of force was in ZH's best interests. The dangers he faced of escape and re-entering the pool were not, given the number of lifeguards and carers present, severe, compared with the risk of injury by such forcible restraint to an autistic and epileptic young man; the risk of restraint causing stress is admitted by the Defence, but the police should have known of the risks of such restraint to an epileptic from immediate seizure, even if not from exacerbation of an existing condition of epilepsy. Nor were the actions of the police proportionate in the circumstances, given that as an alternative to such restraint ZH could have been permitted to leave the pool by himself from the shallow end or when on the poolside have been immediately released for his carers to deal with.

130. The common law defence of necessity, had it been available would have been inapplicable in the circumstances; it was not necessary to prevent death or serious injury for him to have been forcibly restrained as he was.

131. ii) <u>False imprisonment</u>

The Defence conceded that ZH was falsely imprisoned from the time he was restrained by the officers at the poolside. The same arguments in relation to the application of the **Mental Capacity Act** 2005 and the common law defence of necessity are applicable here. For the same reasons as expressed above they fail and as a consequence the Claimant was imprisoned from first restraint on the poolside to the time when he was released from the police van to the custody of the carers. I accept that Miss Harley, as Miss Studd submits, was allowed to speak to ZH as soon as she arrived and this helped him to calm down so that the restraints were later removed. No consideration was given however to the placing of ZH in one of the rooms that might have been available at the pool where he would have been warmer and more comfortable. There would have been no greater risk of him running free, as Sergeant Wallace said, from a room in the pool premises than from the police van.

132. **The Disability Discrimination Act**

The Defence rightly concede that the use of physical restraint on a severely disabled non-verbal young man is a practice that would give rise to a duty under section 21E(2) of the Disability Discrimination Act 1995, to take such steps as are reasonable in all the circumstances to change that practice so that it no longer has that effect. Were it not to do so the public authority would be guilty of discrimination. The issue under the DDA is therefore whether the reasonable adjustments i.e appropriate changes to the practice, asserted by the Claimant in paragraph 33 of the Particulars of Claim are adjustments which should have been made or, as the Defence contends, are they unrealistic and unreasonable.

133. As a consequence of the amendment I permitted to the Defence during the course of the hearing the Defendant also relies on the defence of justification set out in section 21D(iii)(iv) of the DDA. To establish this defence it has to be shown that the

treatment or non-compliance with the duty was necessary in order not to endanger the health or safety of any person, which may have included that of the disabled person.

134. The reasonable adjustments set out at paragraph 33(i)(ii)(vi) of the amended Particulars of Claim relate to consulting with the Claimant's carers. I am satisfied that these adjustments or changes are made out. It was practicable and appropriate, indeed essential, that the police informed themselves properly before taking any action which led to the application of force on the Claimant. As I have found earlier in this judgment Mr Badugu could and should have been consulted by PC McKelvie before she moved towards and touched the Claimant, and should have been consulted in more detail by PC Colley before she moved forward towards the Claimant. During the next phase, whilst the Claimant was in the pool for some 5-10 minutes there was ample opportunity for one of the five police officers to have consulted Mr Badugu or Ms Namballa as to what procedure should be followed given that ZH was in the pool. Even during restraint at the poolside the advice given by the carers as to the inappropriateness of restraint could have been listened to and followed. It was both realistic and reasonable for such steps to have been taken and I am satisfied that the defence of justification is not made out by the Defence. It was not necessary in order to avoid endangering the health or safety of any person, including that of ZH, to have carried on without seeking information and advice from the carers. On the contrary it was the failure to take such information or advice which led to the unfortunate sequence of events which followed.

135. Miss Studd submitted that as there was no evidence that the police intended to restrain him in advance of him coming out of the water it would not be reasonable to expect the police to have consulted the carers beforehand. I reject this submission. The duty to consult the carers arose from the outset, and the duty to make reasonable adjustments was a continuing obligation throughout. In any event, as I have found, the police did decide, by means of a very brief discussion, to lift ZH from the water to the poolside leading as was entirely foreseeable, to virtually immediate restraint.

136. Miss Studd is right in saying that Mr Badugu could have approached the police and sought to give them information and advice but the police clearly felt the need to take control of the situation without such information and advice and it was in any event their duty to make such adjustments as were reasonable under the DDA. The video link evidence of Mr Badugu was regularly interrupted by system breakdown and I have made all due allowance for that in my assessment of his evidence. However diffident he was in giving his evidence (much of which may be due to the video link problem) he was undoubtedly not proactive on the day in question even though he was in charge of ZH. Nevertheless I am entirely satisfied that he had the requisite knowledge and experience, that he had been appropriately trained, and was able to and would have given relevant information as to ZH and how best to deal with him. I am satisfied that he certainly would have said that ZH should not be touched. I am equally clear in the conclusion, that either he or Ms Namballa would have advised, had the police spoken to them, that ZH should have been given the opportunity to leave the pool of his own volition and that physical restraint was inappropriate and counter productive.

137. Whilst therefore it may be correct to say that Mr Badugu could have been more proactive in his dealings with the police, the duty was on the police to carry out the reasonable adjustment of seeking information and advice from him and later Ms

Namballa, before acting as they did. The failure to do so resulted in a step by step escalation of the problem, increasing, as Miss Williams submits, the safety risks for ZH and indeed the potential risk for others.

138. As to adjustment (iii) relating to allowing ZH opportunities to communicate with his carer during restraint and when in the van there was no communication until Miss Harley arrived although she was allowed to speak to the Claimant and calm him down on her arrival. Communication with his carers should have been allowed throughout. That also was a reasonable adjustment to make given the Claimant's distress and his autism.

139. I also accept that the Claimant should have been given the opportunity to move away from the poolside at his own pace (adjustment (iv)), that the police should have recognised that force should have been the option of last resort (adjustment (v)) and that a calm, controlled and patient approach should have been taken at all times in their dealings with the Claimant (adjustment (viii)). The need for a calm assessment of the situation and the acquisition of knowledge of how to deal with the autistic young man before taking any precipitate action, was essential.

140. I am also satisfied that the police should have considered the alternative strategies to deal with the situation and there is no evidence that they did so. Any strategy might have posed some problem but the least appropriate solution was the one which was adopted. Even if a cordon of police officers to prevent him from re-entering the pool was not practicable, because of their earlier actions and ZH's reaction to them, permitting him to leave the pool by himself from the shallow end having been released by the lifeguards so that he could be met by his carers standing at the edge of the pool, was an option neither discussed nor considered nor attempted. That was also a failure to make a reasonable adjustment.

141. It is not possible to say what would have happened had these reasonable adjustments been made. I am however satisfied that each of the adjustments suggested may well have led to a better outcome than the course of action which the police in fact took.

142. The Claimant has therefore made out a breach of the Disability Discrimination Act 1995 and the police have failed to establish the defence of justification.

143. **Human Rights Acts claims**

In view of the factual findings I have made I am satisfied that there has been a breach of Articles 3, 5 and 8.

Article 3

144. When the duration of the force and restraint, injury sustained, and age, health and vulnerability of ZH are taken into account I am satisfied that there has been a breach of Article 3. The minimum level of severity has been attained when the whole period of restraint is taken into account. It is not just the application of handcuffs and leg restraints which has to be considered but the whole time when restraint on the poolside and in the van occurred which has to be considered. It is clear that there was no intended humiliation in this case as there was in *Archip* but nevertheless the treatment of ZH amounts to inhuman or degrading treatment.

Article 5

145. The nature and duration of the restraint lead me to the conclusion that there was a deprivation of liberty, not merely a restriction on movement on the facts of this case. Furthermore, even though I am of the view that the purpose and intention of the police (namely at least in part to protect ZH's safety) is relevant to the consideration of the application of Article 5, I am nevertheless satisfied that even when that is taken into account, a deprivation of liberty has occurred. The actions of the police were in general well intentioned but they involved the application of forcible restraint for a significant period of time of an autistic epileptic young man when such restraint was in the circumstances hasty, ill-informed and damaging to ZH. I have found that the restraint was neither lawful nor justified. Even though the period may have been shorter than that in *Gillan v United Kingdom* 2010 APP No 4158/05, it was in my judgment sufficient in the circumstances to amount to a deprivation of liberty under Article 5.

Article 8

146. On the findings that I have made the Article 8 interference with ZH's private life cannot have been "in accordance with the law" under Article 8(2). Justification cannot therefore be established by the Defence nor do I view the interference with his private life as proportionate in all the circumstances that I have found.

The Role of the School Staff and the Pool Staff

(i) The School Staff

In view of the known problem of ZH and swimming pools, it is arguable that the 1:1 support should have been alert enough to the risks of him breaking away from the group, to have prevented it from happening. This may be a counsel of perfection given the difficulties of supervising a group of several autistic children. There was no suggestion in cross examination that inadequate numbers of school staff were used for the group and it may be that ZH's escape could not have been prevented with reasonable care given the number of children being supervised. I certainly would not be prepared to find that ZH should not have been allowed to go on familiarisation visits, especially given that such visits had been successfully undertaken. With the benefit of hindsight it might be said that the policy of undertaking such visits only when the swimming pools were closed to the public, which was introduced after these events, should have been adopted earlier, as it would have reduced the pressure on both the school staff and the pool staff if an incident occurred.

What can be justifiably criticised however, is Mr Badugu's failure to explain to Mr Hartland or the police the precise reasons for maintaining his distance from ZH: i.e what he was doing, why he was doing it and the risks of more assertive action. He was in charge of ZH and it was his responsibility to ensure that the pool staff, and later the police when they arrived, understood what was happening, what needed to be done and what need not be done.

Once the police had taken control (even though no single officer was ever in charge of their actions until Sergeant Wallace arrived) it may have become more difficult for

Mr Badugu to intervene, but he should have attempted to make his and ZH's situation clear.

Whether or not Mr Badugu failed in his duty (the evidence suggests he sought to explain the situation to both Mr Hartland and PC Colley), any fault on his part would not exculpate the police. They had a separate and distinct duty under the provisions of the MCA, and this they failed to perform. They also had to make reasonable adjustments under the DDA which, for the reasons set out above they failed to do. Once they had taken control of the situation they were under an obligation to comply with the MCA and the DDA.

(ii) The Pool Staff

Save in one respect the pool staff dealt with the incident in a proper manner, as best as they were able to do.

Mr Hartland's exasperation at the apparent ineffectiveness of the carer led to his calling the police in an attempt to resolve the problem of having a fully clothed, disabled boy at the edge of the pool, contrary to both pool policy and the interests of ZH's safety. He clearly perceived the need to break the deadlock, though if he had had more patience and accepted Mr Badugu's advice to await the arrival of assistance from the school which was on its way, and not call the police, matters would probably have unfolded in a different way. His real error however was the misdescription to the police operator of ZH's behaviour. To describe this as "aggressive" when that, on his own evidence, was not the case, created a misleading impression to the police which may well have influenced how they dealt with the matter, and took control on their arrival at the scene. Whether it did or not, it was a statement which should not have been made: Mr Harland's first intention had been to call the Police Community Support Officers and it was only after he had described the scene at the pool that he was advised that that was not appropriate and was put through to the 999 control room.

Whatever criticisms can properly be levelled at Mr Hartland they do not relieve the police from their duty to comply with the DDA and the MCA once they arrived and started to act in performance of their public duties.

Quantum

147. Personal injury

a) Post traumatic stress disorder

GH, ZH's father, told me that after the incident ZH's sleep was affected; he changed from a loveable little kid into an upset child; he did not want to bath or shower or go into water, and was very stressed; he lost interest in everything and did not want to leave home. Miss Studd points out that whilst there may have been a deterioration in ZH's level of anxiety for some two months after the accident there is no adequate independent evidence to support any further or continuing increased anxiety after that time. The school records and behaviour records disclose no comments about such behaviour and indeed he made good progress in 2009.

148. Miss Williams submits that whilst the school records do not record many of the matters of which GH complains, they do confirm that he did not go out on school outings and that there was an increased level of behavioural incidents after the event.

149. In essence I accept GH's evidence as to ZH's condition after the accident. The effects of these events on ZH lasted considerably longer than 2 months, and at times were distressing and difficult for him, even if generally he was able to cope with school life apart from outings. In their joint statement the psychiatrists agree that if GH's account is broadly correct, ZH did suffer from post traumatic stress disorder of moderate severity with a fair prognosis over time; with treatment the symptoms are likely to have further improved and eventually resolved.

150. The recommended bracket for moderate post traumatic stress disorder in the JSB guidelines is £5,400-£15,250. I assess the damages under this head at £10,000.

b) Temporary exacerbation of epilepsy

The exacerbation period is agreed at two years. In the year after the incident ZH had five seizures and in the following year seven. This compared with one in the year prior to the index event, two in the year proceeding that and no seizures between 2004 and 2006. GH told me that his son's seizures were longer and slower to recover after the incident.

151. Both parties are agreed that the Claimant's condition comes within the category of "other epileptic conditions" in the JSB Guidelines. The range is £7,000-£17,250. The Defendant submits that the award should be at the lower end as the Claimant would have suffered from fits anyway.

152. I assess the damages under this head to be £12, 500.

153. Injury to feelings under the Disability Discrimination Act

This was a relatively short incident, but as Miss Williams submits, undoubtedly frightening and distressing for the Claimant. The psychiatrists are agreed that he is likely to have suffered from an acute level of psychological suffering during the incident and would have perceived it as an unwarranted attack on his person. The use of considerable restraint would have been particularly distressing for him.

154. There is an overlap between this element of damages and damages for personal injury and for assault. By reference to the lowest bracket in *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102 where the brackets for damages for discrimination are set out, I award the sum of £5,000.

155. Damages for assault to the person

a) Loss of liberty

This was for about 40 minutes, from first restraint to removal from the police van. The levels of basic damages are set out in *Thompson v Commissioner of Police of the Metropolis* 1998 QB498. £500 is in my judgment the appropriate figure for this head of damages.

b) Pain and distress from the trespass

Mindful of the need to avoid overlap with other levels of damage I assess this at £250.

156. Aggravated and exemplary damages

I do not consider it appropriate to award aggravated damages as I am satisfied that the compensation I have awarded provides the Claimant with adequate compensation. In view of the fact that an award has been made under the DDA claim the risk of overlap is such that an award of aggravating damages is inappropriate.

157. I do not make any award of exemplary damages. Whilst the police action was in my judgment hasty and ill-informed it was not arbitrary and oppressive. The police acted in a misguided but well intentioned manner.

158. Human Rights Act Claims

The remedies obtained in the litigation under domestic law have afforded just satisfaction and it would be inappropriate to make any damages award under the HRA section 8.

159. Summary of Damages

	£
Post traumatic stress disorder	10,000
Exacerbation of epilepsy	12,500
Disability Discrimination Act damages	5,000
Tresspass to the person	
- loss of liberty	500
- pain and distress from the assault	250
	28,250

160. Declaratory Relief

I will hear submissions as to the nature of the declaratory relief which is appropriate when I hand the judgment down. Counsel for the Claimant should prepare a written draft of the declarations sought and counsel for the Defendant to provide written comments thereon.

161. **Conclusion**

The Claimant has established his claim under trespass to the person, for assault and battery and false imprisonment, under the Disability Discrimination Act 1995 and

under the Human Rights Act 1998. He is entitled to recover £28,250 damages and to declaratory relief.

162. This case is another example of the difficult role the police are often called upon to play. None of them were fully aware of the features of autism, what problems it presented and how it should best be dealt with in a situation such as occurred at the Acton swimming baths. They were called to the scene by a misleading message about ZH's behaviour, and on arrival perceived the need to take control and be seen to be taking steps to deal with the situation. What was called for was for one officer to take charge and inform herself of the situation, as fully as the circumstances permitted so as to be able to decide on the best course of action to take. That did not happen: their responses were over-hasty and ill-informed, and after ZH had gone into the pool matters escalated to the point where a wholly inappropriate restraint of an epileptic autistic boy took place. They did not consult properly with the carer who was present when they arrived, even if he was not as proactive as he might have been in informing them of what was happening, what needed to be done and what needed to be avoided.

163. The opportunities to take stock, before ZH went into the pool and whilst he was in it, were not taken. All of those involved in this incident were acting as they genuinely thought best, whether pool staff, carers or police, and it is clear to me, having listened to their evidence, that all have been to some extent emotionally affected by the events of that day. Whilst I am clear in my conclusion that the case against the police is established, I am equally clear in concluding that no one involved was at any time acting in an ill intentioned way towards a disabled person.

164. The case highlights the need for there to be an awareness of the disability of autism within the public services. It is to be hoped that this sad case will help bring that about.