



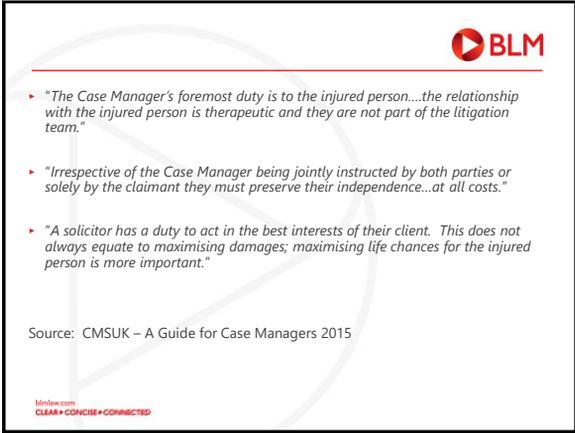
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Rehabilitation – The Defendant’s Perspective

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- ▶ *“The Case Manager’s foremost duty is to the injured person...the relationship with the injured person is therapeutic and they are not part of the litigation team.”*
- ▶ *“Irrespective of the Case Manager being jointly instructed by both parties or solely by the claimant they must preserve their independence...at all costs.”*
- ▶ *“A solicitor has a duty to act in the best interests of their client. This does not always equate to maximising damages; maximising life chances for the injured person is more important.”*

Source: CMSUK – A Guide for Case Managers 2015

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- ▶ *“Involving the insurer to try to agree the best way forward at an early stage can be beneficial in helping and contributing to early recovery and resolution; and can establish an element of mutual trust.”*

Source: APIL – Best Guide on Rehabilitation

- ▶ *Rehabilitation must be aimed to reasonably maximise the independence and quality of life of the injured person and not create dependence*
- ▶ *A good Case Manager or rehabilitation provider is worth their weight in gold.”*

Source: CMSUK – A Guide for Case Managers 2015

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BASIS OF A GOOD WORKING RELATIONSHIP



- ▶ Joint Instruction
- ▶ Good communication
- ▶ Regular meetings inc MDT
- ▶ Understanding of respective duties
- ▶ Full disclosure of records
- ▶ Managing Expectations
- ▶ Involvement of Deputy where appropriate
- ▶ Funding (statutory and insurer)

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BENEFITS AND AIMS OF JOINT INSTRUCTIONS



- ▶ Agree treatment programme
- ▶ Dialogue -especially with Case Manager; joint meetings, MDT
- ▶ Easier to address specific issues/ concerns
- ▶ Better insight for Defendant with Claimant's circumstances and domestic arrangements
- ▶ More likely to fund under the Code
- ▶ Keeps civil litigation civil

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Case Study (1)



- ▶ Adolescent Male Claimant; TBI
- ▶ Liability conceded in full
- ▶ C very troubled family background
- ▶ During adolescence, pronounced behavioural difficulties, truancy, poor sleep hygiene
- ▶ CM implemented daytime support worker and night time sleep in carer, failed to address sleep hygiene or truancy; recommended "den" in garden for C's weights, TV and "privacy"
- ▶ Condoned C's soft drug use – "calming"
- ▶ D's experts - Dr Upton, follow up Conference and detailed recommendations for alternative interventions and treatment plan, timescale and referrals;
- ▶ Jane James – costings for these and practical implementation
- ▶ Submitted extracts of evidence to Claimant's solicitors and met with them, their Deputy and Case Manager
- ▶ Agreement to change course and implement D's suggestions; tangible improvement in Claimant's behaviour and demeanour within 6 months.
- ▶ Case settled at JSM a few months later. Future care package largely on the lines proposed by D

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Case Study (2)



- ▶ C aged 8; near drowning,
- ▶ Massive hypoxic brain injury, partially ventilated, tube fed
- ▶ 24/7 double up care
- ▶ V difficult family and solicitors Jointly instructed and appointed Case Manager and collaborative approach adopted
- ▶ Jointly instructed care expert; sourced appropriate rental property for C and extended family
- ▶ We instructed CM to maximise public funding. Currently £130k out of £300k p/a package funded by CCG/ Social Services
- ▶ D has full access to medical and rehab records; attends MDT meetings with treating clinicians and CM; 6 monthly meetings with C sols and Deputy.
- ▶ Successfully opposed purchase of unsuitable property
- ▶ Claim ongoing

CAUSES OF PARTIES' POOR RELATIONSHIPS



- ▶ Failure to manage the Claimant (and family)
- ▶ Poor communications
- ▶ Poor disclosure of records
- ▶ Barriers to access
- ▶ CM as expert/advocate in the litigation
- ▶ Unreasonable refusal to fund
- ▶ Proposed regime excessive or unrealistic

Areas of challenge



- ▶ Shadow Case Manager/experts.
- ▶ On the recommended treatment path itself or aspects of it such as duration, timing, costs, suitability.
- ▶ Suggest alternative treatment plan supported by expert(s) with reasons and costings.
- ▶ Deputy involvement – if you consider claimant's best interests not being met and damages spend is a concern, eg excessing property, vehicle(s).
- ▶ Meet Claimant's solicitors (and Case Manager) to discuss/ explain



- Interim Payment Application
- Liability 85:15 for C. Severe TBI and orthopaedics
- £215,000 p/a, care, case management
- C sought further IP of £275,000 bringing total to £1.175M
- D had already paid £900k and refused
- C valued lump sum at £1.530M safe margin under *Eeles* (1). D valued at £1.065M
- D's two arguments:-
 1. "Peters"- failure to mitigate
 2. "Loughlin" – reasonableness of rehab regime
- C had rejected social housing offer of 2 bedroom flat in place of his unsuitable one bed flat; he wanted a 3 bed property but eventually rented a 2 bed property similar to that he had rejected
- Rehab regime – D's experts heavily critical of "stiffing" regime; suggested alternative regime, cheaper and meant IP would not have run out.
- HELD:- Judge satisfied D had arguable and fundamental point that the regime was open to question and that a Trial Judge would reduce Claimant's past losses significantly
- C unreasonable failure to mitigate by rejecting social only to obtain same or very similar accommodation privately.



- ▶ **Treatment of family members?**
Not strictly recoverable but in principle, yes if it assist's C's recovery/rehab
- ▶ **Joint instruction of experts?**
Rare but undertaken if appropriate
- ▶ **Young adults in relationships**
Future care impact

ACCOMMODATION CLAIMS



- As regards purchase costs the leading case is *Roberts v Johnstone*. Claimant is not awarded the full amount of the increased purchase cost of the new property and increase in value
- Subject to reasonableness alteration costs in principle are recoverable from the Defendant in full where they do not add value to the property. Unsurprisingly this is often a very contentious issue between the parties and there is reliance upon expert evidence.
- Courts approach this on the basis that the cost of purchasing a new property equates to the loss of net income which the capital purchase price would have earned had it been invested. The lost income formerly calculated per *Roberts v Johnstone* by multiplying the difference between sale price the old and purchase price of the new property by the prevailing discount rate and then multiplying it by the Claimant's life expectancy.

Example

- New Property cost £500,000
- Old property cost £250,000
- Difference: £250,000 x 2.5% = £6,250
- Life Expectancy 25
- 25 x £6,250 = £156,250

*However with a negative discount rate this formula does not work