Caveat Case Manager

Stephen Cottrell*

Brain damage; Care expenses; Measure of damages; Past loss

Abstract

In this article, Stephen Cottrell discusses the potential ramifications for claimants of the judgment of Kenneth Parker J. in Loughlin v Singh, Pama Co Ltd and Churchill Insurance[1] *which permitted a negligent Defendant to reduce its liability for the past costs of case management and care where the case manager had provided an inadequate service, the apparently conflicting decision of Stuart-Smith J. in* Ali v Caton and MIB[2] *and the legal issues that these cases raise.*[3]

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Two recent decisions

In *Loughlin*, the claimant's damages for past care and case management were reduced by 20 per cent following criticism of the case management and care regime that had been in place. Shortly after judgment in *Loughlin* was handed down, Stuart-Smith J. appears to have rejected a similar argument in the case of *Ali* in which *Loughlin* was not cited.

The *Loughlin* case in particular begs the question whether the position remains as set out by Stuart-Smith J. in *Ali*, that:

> "The position of a significantly brain-damaged claimant who acts on the basis of apparently reasonable advice is strong, though not always impregnable, when seeking to recover the costs of doing so from a tortfeasor?"

If followed, the effect of *Loughlin* might be to shift the financial burden created by poorly performed case management from institutional defendants and insurers to brain injured claimants.

The Loughlin case

Kristopher Loughlin was 12 years old when the first defendant knocked him from his bicycle, causing him a traumatic brain injury. He was 23 when the matter came to trial on quantum. There was damage to the left frontal lobe, his powers of motivation, initiation and organisation were greatly reduced and although his IQ was well preserved, Kristopher struggled to use his intelligence outside of a structured setting. His cognitive abilities would rapidly become overloaded and he would become fatigued very quickly. A real challenge for the experts and the judge in the case was trying to separate out the effects of the brain injury in terms of the claimant's executive function and lifestyle, especially regarding sleep, and the ordinary behaviour of an adolescent. Kristopher was a young adult during the period with which the judge was concerned.

* Stephen Cottrell is a barrister at Devereux Chambers specialising in high-value personal injury claims. He can be contacted by telephone at 020 7 353 7534 and by email at *Cottrell@devchambers.co.uk*.

1 *Loughlin v Singh* [2013] EWHC 1641 (QB).

2 *Ali v Caton* [2013] EWHC 1730 (QB)—argument concluded before judgment in *Loughlin v Singh* [2013] EWHC 1641 (QB) was handed down.

3 The author is indebted to the editors of PNBA's Facts & Figures 2013/14 and particularly to the short analysis by James Rowley QC and Alison Somek of these issues in section K1.

Kristopher was found to lack capacity—a major issue in the judgment—and there is a separate annex to the judgment that deals with the judge's strong criticisms of one of the experts on that issue.

The judgment records that a case manager was "appointed" in early 2009, although there is reference to her having made a case management plan in December 2008. In any event, the case manager came into the case some six years following the accident and when Kristopher was 18. At this stage plans were being made for Kristopher to move into his own home, having previously been living with his mother. Kristopher moved into a flat in the centre of Manchester in 2010 with 24-hour support. The plan was to withdraw the support gradually as Kristopher became more independent. Support was removed at night with a support worker remaining on call. Kristopher had begun a music production course in late 2009 requiring attendance at lectures and practical time in a studio. The judge recorded that as support was removed at night:

> "The conditions in the flat then deteriorated. The Claimant's sleep pattern also worsened so that he failed to get to bed until the early hours of the morning and failed to get up until the afternoon. More extensive support was restored."

The claimant experienced various disruptive life events in 2009–2011. An appointment with a consultant neurologist with a special interest in sleep disorders was made in October 2011. A raft of measures—some of which were specifically aimed at improving Kristopher's sleep—was instituted in October 2011. These measures included participation in voluntary activities such as RSPCA dog-walking and working at a radio station. Kristopher agreed to start an eight-week sleep programme under the guidance of the specialist consultant neurologist in February 2012. He engaged with that programme and extended it.

At the time of trial, Kristopher had a sleep-in support worker for five nights per week, except for Saturdays and Sundays, as well as support workers throughout the day. He followed the sleep regime for the five nights when the support workers were present. The regime was working well.

Criticisms and findings in relation to past care and case management in Loughlin

The defendant was critical of the case manager for failing to devise and institute a sleep regime at a much earlier stage. It was also said that the support workers were employed for non-essential tasks.

Against the backdrop above, the court had to consider a bold submission by the defendant that the judge, "should disallow the costs of past care and management".

The judgment notes the criticisms made in their joint report by the expert neuropsychologists of the case management and care regime which, according to them, lacked clear goals and which was inappropriate because it permitted the support workers to engage in providing services such as transport and domestic work without the involvement of the claimant, thereby "fostering dependence rather than independence". In essence, Kenneth Parker J. accepted these criticisms.

Kenneth Parker J. was critical of the claimant's case manager's failure to devise any sleep programme until May 2010 despite the issue having been identified as problematic as early as December 2008 and recorded again on subsequent occasions. When the sleep programme was devised, the judge criticised it for the lack of any specified rising time or any designated early morning activity—apparently a reason why Kristopher did not initially engage with it. He implicitly criticised the failure of the case manager to ensure that the claimant—then aged 20 and living alone for the first time—adhered to the sleep programme. The judge noted that when the night care regime was then reduced without the claimant agreeing to be part of a sleep programme: "The Claimant's life fell into disorder and night cover had to be re-instated." It was noted that the sleep programme remained unaddressed thereafter until September 2011.

The judge "was not convinced"' by the evidence of the case manager and of the claimant's care expert that as an adolescent Kristopher would not have engaged with a sleep regime at an earlier stage in any event. He found that "the care team" did not recognise the fundamental importance of addressing the need

for a specific and effective sleep regime until the problems with sleep had become chronic and overwhelming. He found that, before a sleep programme was put in place: "The efforts made on this fundamental aspect of rehabilitation were simply not adequate."

Kenneth Parker J. then rejected the defendant's primary submission:

> "that I should disallow the costs of past care and case management, on the basis that the standard of such care and management fell significantly below that which could reasonably be expected to meet the exigencies of the Claimant's condition and circumstances."

The judge agreed with the claimant's counsel that this would:

> "operate with undue harshness on a successful Claimant, who had had to receive, and pay for, as a result of the Defendant's wrongdoing, care and case management services and who had had in fact very substantial benefit from such services. To deprive a Claimant of all compensation for incurring such costs, whatever the shortcoming in their delivery and whatever the benefit received would be wholly inappropriate and unjust."

That is perhaps a very unsurprising decision, although the potentially significant aspect of the decision followed in these terms ([62]):

> "However, it does seem to me that principle requires that I should take due account of the fact, that I have found, that the standard of the care and case management services did, in an important respect, fall significantly below the standard that could reasonably have been expected. In other words, the objective value of what the Claimant received was less than the amount of the charges made for the relevant services. There is no precise means of quantifying the appropriate reduction: the exercise requires the court to take a broad view of what the Claimant did receive, and the nature and extent of the putative shortcoming, bearing in mind the particulars difficulties in the case, to which I have already referred. It appears to me, balancing these factors, that a reduction of 20 per cent in the charges actually claimed would be fair and proportionate."

Before commenting on the legal basis of this decision, it is worth noting that the judge did not actually carry out a mathematical exercise or forensic exercise that led him to deduct 20 per cent from past care and case management, so that it is not immediately clear to which past care and case management costs this applied; it would appear that it relates to all past commercial provision (it clearly did not apply to gratuitous care provided when the claimant was living at home), and is not expressed to take effect only after a given date by which time a sleep regime ought to have been in place. Further, the judge did not make detailed findings as to the level of future care needed, rather making a finding that there could be a gradual reduction in the level of care over a period of four years and leaving the parties to agree the finer details. It follows that it is not clear what he envisaged as the appropriate night care regime going forward and so that part of his judgment offers no clue as to the precise basis for the 20 per cent deduction.

Discussion: The judge's findings

Kenneth Parker J. evidently judged the actions of the case manager against a high standard. He seems to have implicitly imposed a duty upon the case manager not only to identify the need for a sleep programme, but to be able to identify a suitable programme quickly and to ensure that a brain-injured young man, living alone for the first time, should in fact cooperate with a programme of this sort. The judge was clearly aware of the difficulties that the case manager would encounter in these circumstances and recorded the evidence of the claimant's care expert[4] in detail in the judgment.

[4] Maggie Sargent.

Any decision as to the perceived failings of a case manager will be fact-specific and it is always open to claimants to argue that such failings are easy to identify with the benefit of hindsight.

What makes the decision especially difficult to analyse is the lack of any clear finding as to the effects of the failings that were found.

It seems to be implicit in the judgment that there would have been a substantial need for less support work provision had the sleep programme been instituted sooner. It might be thought that where a claimant is to be deprived of damages for losses that he has incurred, thereby creating a potential shortfall in his overall award, there is a need for precision in the judgment. The judgment would be easier to rationalise had it spelled out the effect of the failure of the cases manager. Surely there should be a "but for" analysis in which the court specifies how much care would have been necessary had the case management been up to scratch; the additional care provided as a result of the inadequate service provision can then be identified so that the mathematical and logical basis for any deduction is clear, even if the court necessarily applies a broad brush when assessing the financial effect of the deduction.

Discussion: The legal position

It is not immediately obvious to see how Kenneth Parker J. came to the conclusion that he reached as a matter of law.

The starting point is that the claimant's loss—i.e. the reasonable cost of employing support workers and a case manager—was a consequential loss that flowed from the negligence of the defendant. As a matter of first principles, that loss should be recoverable from the defendant.

The following established defences might have had the potential to lead to a reduction in the claim for care:

- **Unreasonable failure to mitigate**

  For damages to be reduced on the basis of a failure to mitigate, a court needs to find that the claimant acted unreasonably and that the unreasonable conduct led to an increase in the loss. It is for the defendant to prove all elements of the failure to mitigate—i.e. that the claimant behaved unreasonably, and that this behaviour caused an increase in the loss.

  The argument for the defendant does not appear to have been put this way. It is very difficult to see how a brain injured claimant, a litigation friend or deputy could be found to have acted unreasonably in circumstances where they employed support workers as recommended by a case-manager. They would have been following the advice of a professional who had been specifically appointed for the purpose of co-ordinating care, in which case their position would be "strong but not necessarily impregnable" as per the dictum of Stuart-Smith J. above.

  Although a claimant's damages may be reduced for the failure to mitigate of his agent (such as a Deputy) it is difficult to see how a case manager could be held to be an agent of the claimant when it comes to arranging care and support. She may well have been engaged and/or funded directly by the defendant's insurer. The relationship is likely to be an arms-length contractual arrangement between the case management company and the claimant or his deputy. The case manager is always a potential witness and must be neutral and independent in giving evidence. That does not sit well with the concept of agency.

  As will be set out below in the discussion of case-law on payments to third parties, the concept of mitigation has been narrowly construed so that an unreasonable decision by a third party taken on behalf of the claimant that increases the claimant's loss will not constitute a failure by the claimant to mitigate loss. That means that unreasonable decisions made by a case manager that lead to higher care costs should not be treated as unreasonable behaviour

by the claimant and it follows that damages should not have been reduced on mitigation grounds had that been the basis for the decision in this case.

A relevant facet of the law on mitigation of loss is that a claimant is under no duty to "litigate to mitigate"—i.e. to embark upon uncertain litigation in order to seek to minimise his loss.[5] This means that a claimant's damages should not be reduced on the basis that he can reduce his loss by bringing a claim against a third party such as a case manager or care agency for fees that he has paid over, or to defend a claim against him for their fees. It would not be unreasonable for an injured claimant to refuse to embark on such uncertain subsequent litigation.

- **A break in the chain of causation**

It is possible to envisage circumstances in which a case manager might recommend some experimental treatment, care regime or piece of equipment the need for which is not supported by any compelling evidence. To use an extreme example, an inexperienced case manager might decide that she has read about the beneficial effects of hypnotherapy for a claimant who has aggressive tendencies. She might book a course of weekly sessions for the claimant at a cost of £1,000 pa over three years, paid out of the claimant's interim payment. Suppose the expert evidence at trial does not support the need for the hypnotherapy treatment.

The court could properly disallow the cost of the hypnotherapy on the basis that it was not reasonably needed and did not flow from the accident. The claimant only bought the hypnotherapy sessions because his case manager recommended them—her actions caused the chain of causation to be broken and the "loss" is not recoverable, notwithstanding that the claimant has been paid for it. That is to be contrasted with a situation in which a claimant clearly did require case management and support services, the need flowing from the accident, with the argument being about the extent of those services.

Once again, it does not appear from the judgment of Kenneth Parker J. that the case was argued on this basis.

As pointed out by James Rowley QC and Alison Somek in the notes to section K1 of PNBA's *Facts and Figures 2013/14*, the chain of causation may be broken by gross negligence by a third party following the negligence of the defendant. The cases in relation to this issue tend to deal with concurrent tortfeasors and it is not immediately obvious that criticisms of a case manager who is not a party to the litigation fit comfortably within this analysis. Moreover, there was no finding of gross negligence in *Loughlin*, and it is difficult to see how such a criticism could be made out except in the most extreme circumstances, given all the difficulties confronted by a case manager who has to deal with a brain injured claimant and manage family members, support workers and medical service providers.

- **The claimant is under no obligation to pay**

The recent case law on services provided by third parties following an accident for which the claimant has no obligation to pay is dominated by credit hire cases.[6] Conveniently these cases also delve into the law of mitigation in detail. Despite the different context, it is clear that the courts in deciding the proper measure of damages and mitigation of loss in negligence

[5] *Pilkington v Wood* [1953] Ch. 770.

[6] An area with which junior PI lawyers may be more familiar than their senior counterparts. In a classic credit hire case the hire company provides a claimant with a car following a simple RTA. The car is provided on credit, so that the claimant need not pay up front. The claimant is obliged to bring a claim against the tortfeasor for the hire charges. Credit hire charges are often (although not always) significantly more expensive than comparative ordinary hire charges. The defendant's insurer will therefore seek to have the charges reduced or in some cases disallowed. Litigation relating to credit hire has occupied the higher courts for almost 20 years since *Giles v Thompson* [1994] 1 A.C. 142.

claims have sought to apply well-established principles extracted from a wide variety of cases. The courts have consistently rejected any "rule of thumb" approach in assessing damages and have emphasised the need for an evidence-based approach in line with established principles.

The leading case is *Dimond v Lovell*.[7] Under consumer credit legislation the claimant who had been provided with a hire car on credit following an accident in which the defendant negligently damaged his car could not be liable for paying hire charges to the hire company as their written contract did not comply with the relevant regulations. He had not paid anything and he could not be made to pay anything. He had, therefore, suffered no loss in respect of the cost of the hire car. He could not recover the cost from the defendant.

For this outcome to come about, the contract had to be "irredeemably unenforceable". If there was any chance of the hire company being able to sue the claimant for its unpaid charges then it could not be said that the claimant had suffered no loss. It was the strict provisions of the Consumer Credit Act 1974 (as it stood at the time—it has since been amended) that permitted this outcome. It would not be enough for the claimant to have a contract that was voidable. Further, a claimant was not required to "litigate to mitigate"—if there was uncertainty as to the outcome of a claim by the service provider (i.e. the hire company) then the tortfeasor could not escape liability by requiring the claimant to bear the risk of unsuccessfully defending a claim by the hire company.

Applying that reasoning to *Loughlin*, the defendant's primary submission that the past care and case management should be disallowed should have failed on the basis that unless the court could be sure that a case manager or care agency had no prospect of recovering unpaid fees from Kristopher then there could be no basis for arguing that there was no liability to pay.

Moreover, in the case of *W v Veolia Environmental Services*,[8] H.H. Judge Mackie QC where the claimant had signed a hire agreement that was unenforceable under consumer protection legislation but the charges had already been paid over to the hire company on the claimant's behalf under an insurance policy, the fact that the charges had been paid meant that it was irrelevant that the clamant had no liability to pay. He had paid and so he had incurred loss. Again, he was under no obligation to shoulder the burden of bringing a claim against the Hire Company for the overpaid amount and so the defendant had to pay the hire charges.[9]

If the basis of Kenneth Parker J.'s decision was that the claimant would have been entitled to withhold or recover 20 per cent of the care and case management fees on the basis that the services were poorly delivered, it should follow that the fact that payment had been made meant that the measure of the claimant's loss was the amount that he had paid. Where a claimant has (through interim payments) paid support workers and perhaps a case manager, the fact that he might be able to dispute the amount of their fees on the basis that the services, "fell significantly below the standard that could reasonably have been expected" should not come to the aid of the negligent defendant.

Significantly, in *W v Veolia* the fact that the insurance company must have known when it made the payment that the claimant had no liability to pay the hire charges could not amount

[7] *Dimond v Lovell* [2002] 1 A.C. 384.

[8] *W v Veolia Environmental Services* [2011] EWHC 2020 (QB); [2012] 1 All E.R. (Comm) 667.

[9] *W v Veolia Environmental Services* [2011] EWHC 2020 (QB). In fact, the decision to pay the hire charges was taken in effect by the hire company itself. In credit hire cases if the claim fails the hire company would not ordinarily be paid. The decision to pay was made by the hire company for the benefit of the hire company, yet H.H. Judge Mackie QC held that this artificiality did not matter. What mattered was that the charges had been paid. By the same token, one might expect a great degree of judicial sympathy for a brain-injured claimant who has honestly paid over care and case management fees out of his interim payments.

to a failure to mitigate by the claimant. He was a layman and was not to be taken to be aware of his consumer rights. H.H. Judge Mackie QC rejected an attempt to equate the knowledge of the insurance company and hire company with the claimant's state of knowledge. When considering mitigation of loss it follows that it is the state of mind of the claimant—and not of his professional advisors—that is relevant and it is the reasonableness of the claimant's behaviour that falls to be assessed.[10] This principle was reaffirmed by Cooke J. in *Coles v Hetherton* .[11]

As stated above, it follows that an unreasonable decision by a case manager should not amount to a failure to mitigate by the claimant.

This line of authority also deals with reducing the amount of damages where the payment made by a claimant was above the "going rate". That is of relevance to the principle relied upon by Kenneth Parker J. that, "the objective value of what the Claimant received was less than the amount of the charges made for the relevant services".

In *Dimond* the House of Lords grappled with how to reduce credit hire rates that were higher than market rate. They adopted the solution of allowing a "spot hire" rate—i.e. the equivalent market rate. Subsequent cases showed that where the defendant was unable to show what the market rate was, there should be no deduction. In the wake of *Dimond*, the Court of Appeal in *Burdis v Livsey*[12] specifically rejected the use by a trial judge of an arbitrary percentage deduction to be applied in all cases. It is difficult to see why an arbitrary deduction should have been applied in this case.

If a defendant's insurer cannot accurately identify the extra support work and case management that it says has been generated by the poor performance of a third party, why should the court indulge the insurer by applying a broad-brush approach and thereby creating a shortfall in the claimant's damages, rather then requiring the insurer to prove the impact of the inadequate service of which it complains? The burden created by the inadequate service provision is shifted from the tortfeasor to the innocent and reasonable claimant.

These decisions demonstrate that mere recognition of the fact that charges made were higher than the going rate, or to use the language of the judgment in *Loughlin*, higher than the objective vale of the services rendered, did not automatically lead to a discount. It is difficult to see how the decision of Kenneth Parker J. in *Loughlin* can be reconciled with the reasoning in these recent cases which are of general application.

- **What Principle was Kenneth Parker J. Applying?**

It is difficult to see what principle was in play. The judgment refers to the finding that:

> "the objective value of what the Claimant received was less than the amount of the charges made for the relevant services."

The decision to disallow 20 per cent of past costs that had been paid shifts the burden of potentially excessive costs from the negligent defendant to the:

> "successful Claimant, who had had to receive, and pay for, as a result of the Defendant's wrongdoing, care and case management services and who had had in fact very substantial benefit from such services."

[10] Although it is likely that a Deputy would be treated as standing in the shoes of the claimant for these purposes.
[11] *Coles v Hetherton* [2012] EWHC 1599 (Comm); [2012] R.T.R. 33.
[12] *Burdis v Livsey* [2003] Q.B. 36.

There can be no good policy reason for such a shift, especially where the claimant lacks capacity. Further, the authorities stated above show that there is no established principle that the defendant can escape liability for the excessive charge where it cannot identify the difference between the objective value and the charge in fact made.

The judgment seems to proceed on the basis that those who provide inadequate services should not be rewarded, but there are a number of fundamental flaws with that approach to this case. To begin with, in the first place it is the claimant and not the negligent service-provider who feels the effect of the decision.

The judgment does not explicitly state that the claimant should be able to recover the excessive fees from the case manager and/or the care providers. If the judgment proceeded on the assumption that the relevant companies would reimburse the claimant, there is no legal basis on which any such assumption may properly be made.

The case that was cited by the judge in relation to the defendant's primary submission that all past care and case management costs should be disallowed—cited as *O'Brien v Harris* (February 22, 2001, unreported) but in fact see *O'Brien v Harris* [2001] Lloyds Med. Rep. 347, Pitchford J.—is a long decision on an assessment of damages that does not purport to set down any new principle of law. In a thorough judgment that runs to 355 paras, there are six paragraphs dealing with past rehabilitation programme costs ([191]–[196]) from which it might be gleaned that the judge disallowed some costs because they exceeded estimates that had been given and expressed the view that the shortfall should probably not fall to the claimant. There are other parts of the judgment in which the judge disallowed claims for, for example, accommodation where the claimant had spent more than was reasonably needed, but there is very little in the judgment that would support a submission that inadequate provision of services for which the claimant had paid should lead to the claim being disallowed or reduced by a large proportion.

The fallout: Practical difficulties caused by Loughlin's case

As noted above the effect of the decision is that the claimant will not recover damages in respect of fees that he has paid out (even if the costs were paid directly by the defendant by way of an interim payment, he will have to account for them). Unless the claimant is able to recover the shortfall, he may have to make up the difference from his general damages or, worse still, from his claim for future care—thereby causing the potential for an inadequate standard of care in the future. That cannot be said to be, "fair and proportionate".

The obvious solution might appear to be for the claimant to seek to reclaim the balance from the support workers, or their employers or the case management company.

If the claimant sought to recover the excess from the company that provided the support workers in a case identical to *Loughlin*, the first objection might be that it is not clear from the judgment that there is any criticism of the actions of the support workers. They may have been on hand when they were not required and they may have done work that the experts and the judge subsequently decided was unnecessary and inappropriate, but would the individual support workers or indeed their agency have known that? Indeed did they do anything wrong? Were they not simply doing as instructed by the claimant on the advice of the Case Manager? There can be no certainty that the claimant would succeed in seeking repayment of his damages from the support workers in the absence of any breach of contract on their part. What would happen if the agency was insolvent or no longer trading, or if payments had been made directly to an individual support worker who had died or not been traced? Where the claimant had paid,

the loss falls on him and has been shifted to him from the negligent defendant. That cannot be a fair outcome.

Is the claimant supposed to pursue the case manager for the fees he has paid over in respect of the support workers? What if the case management company has a reasonable exclusion clause in its terms of engagement limiting liability?[13]

Even seeking reimbursement from the employers of the Case Manager may be difficult. The Case Manager is an independent witness at trial. She is not a party to the litigation and neither is her employer. They have no right to make submissions and their interests are not fully aligned with the interests of the claimant. It is perfectly possible that, with the benefit of such submissions, and further evidence, a judge in a subsequent action by the claimant against the Case Management company might find that the Case Manager had not acted unreasonably at all—the judgment in the claim between the claimant and defendant would not be binding on the Case Management company, and it would be wholly inappropriate to have a Case-Management company as a party to the main claim. One can easily foresee cases in which the Case Manager might actually seek to blame a claimant with capacity, a deputy or interfering family members for the poor provision in subsequent satellite litigation.

One might reasonably ask why it should be the claimant and not the tortfeasor who is left in this uncertain and unenviable position.

As a matter of practice, anecdotal evidence suggests that defendants are already seeking to use *Loughlin* in negotiations as a basis for arguing for deductions of 20 per cent or more in cases in which they have supposedly identified inadequate case management.

Where are we now?

The dictum of Stuart-Smith J. in *Ali v Caton* is an eloquent statement of the position as understood by most practitioners prior to *Loughlin*. There is no need for an in-depth analysis of the *Ali* case, but it is instructive to set out in full the relevant paragraph of the judgment,[14]

> "The position of a significantly brain-damaged claimant who acts on the basis of apparently reasonable advice is strong, though not always impregnable, when seeking to recover the costs of so doing from a tortfeasor. On this item, the balance of the argument strongly favours the claimant. In the event, the attempt to prepare Jubair for independent living has not been successful and should now not be maintained. However, as outlined in the main judgment, the institution of the regime was disrupted first by the trip to Bangladesh and then by medical difficulties (both related and unrelated to the accident). While I accept that it may have been possible to do some things better (for example, a more vigorous approach to the implementation of strategies for independent journeys), that does not vitiate the general purpose and reasonableness of the strategy."

It can be seen that Stuart-Smith J. recognised that there was scope for some criticism of the care and case management team but that provided that the strategy implemented was generally reasonable, no ground for a reduction in damages for past losses had been made out.

The approach of Stuart-Smith J. reflects modern authorities on the law of damages relating to mitigation of loss and the relationship between claimants and third party service-providers. To the extent that it differs from the approach of Kenneth Parker J. in *Loughlin*, it is respectfully suggested that the approach of Stuart-Smith J. is to be preferred. Claimants' lawyers faced with a *Loughlin* argument can be confident that there is a weight of authority on which they can call. In reality a judge presented with a *Loughlin*

[13] Perhaps such clauses will become more commonplace following this decision.
[14] *Ali v Caton* [2013] EWHC 1730 (QB) Annexe B at [323(h)].

argument is faced with a stark choice—does he allow the burden created by the negligence of a third party to fall upon the brain-injured claimant or the tortfeasor? The answer in policy terms should be simple.

Defendants seeking to mount a *Loughlin* challenge to a period of past care would be well advised to seek to identify the difference in the level of past provision that they say would have been made by better case management. The more precise the exercise, the more persuasive the argument is likely to be.

Case managers who are called to give evidence should expect robust and detailed cross-examination and should be prepared to justify the decisions that they have made.

Conclusion

Even Stuart-Smith J. recognised that the claimant's position is not impregnable. It may have been possible for the judge to reduce damages on the basis that the chain of causation had been broken by the failings of the Case Manager, and that—for example—her failure to devise and implement a sleep regime in 2009 or 2010 had brought about the need for an excessive amount of support work in, say, a period of two years, with a set number of hours per day deducted on that basis over that period of time. It may even be that the outcome would have been the same. However, authority and principle suggest that a precise apportionment should be made in order to reach that result. Given the potential detriment to the claimant, one might think that a court ought to be reluctant to make a "broad brush", percentage-based deduction over the entire period of past loss.

The most convincing basis for a deduction in *Loughlin* would have been that the non-implementation of a sleep programme had prolonged the need for a high level of care for several years (although this is not articulated in the judgment). Still, that begs the question why the claimant rather than the negligent defendant should bear the burden of having to seek to recover the excess amounts from third parties.

One danger of the evolution of a "principle" that there can be a rough percentage deduction to damages for past care and case management where the poor delivery of the case management has led to a higher need for care is that defendants will now be motivated to seek out examples of poorly delivered Case Management with a view to making this argument in a large number of cases. That outcome would have been less likely had a more precise mathematical and fact-specific exercise led to the deduction. The most unsettling aspect of the *Loughlin* case is undoubtedly the redistribution of risk from the deep-pocketed defendant onto the injured claimant.