

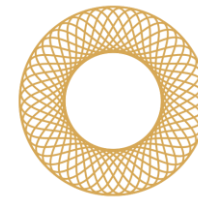
Outer Temple

Case managers and Lawyers

Gerard McDermott KC

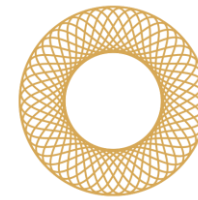
BABICM Conference

19th June 2024



Recent case law

- A limited amount on case managers in that role
- Though note Williams-Henry v ABP
- Several noting the benefit of case management expertise in giving expert evidence – including Williams-Henry
- So a little bit of “back to basics”
- And a look at areas that case managers need to be alert to
- From my perspective



What do the Courts expect

- ***Wright v Sullivan [2005] EWCA Civ 656 :***
- The appellant (S) appealed against a decision not to make an interim award of damages to the respondent (W) conditional on the joint appointment of a clinical case manager, and W cross appealed against the judge's direction that the clinical case manager's evidence should be treated as that of an expert.
- The Court was shown a copy of the principles and guidelines by BABICM. Counsel helpfully summarised the contents of the document, including:
 - g) *The clinical case manager should be responsible for **providing factual evidence** as to work completed and the underlying reasons for this, if so required.*
 - h) *The clinical case manager should only act as a **witness of fact** as regards the service provided for a case management client.*



What do the Courts expect

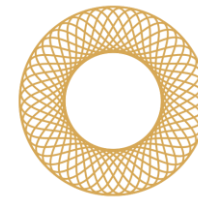
➤ Held, dismissing the appeal and allowing the cross appeal, that:

1) The representatives of both parties and their expert witnesses **should have liberty to communicate with the case manager** in relation to matters relevant to likely issues in the claim.

2) **The clinical case manager would owe duties to the patient alone** and had to make decisions in the best interests of the patient. **Therefore the judge was right to hold that the manager should not be jointly appointed.**

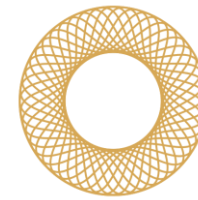
3) If the clinical case manager considered that it was in the client's interests that they should attend a conference with legal advisers at which advice was being sought then **the privilege would not be theirs to waive and the court had no power to direct such a waiver. Nor could the court prevent the manager from attending** conferences with lawyers and experts whose contents were privileged.

4) The role of the clinical case manager, if they are called to give evidence, would clearly be one of a **witness of fact**. They will not be giving evidence of expert opinion.



Wright v Sullivan

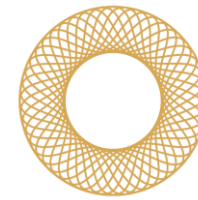
- Still a very useful start even though 2005
 - D anxious to establish some control
 - And early comments about joint instruction
 - Para 20 – BABICM already showing beneficial influence
 - Emphasis on the relationship being therapeutic
 - And a clinical role
 - With a duty to the claimant



What do the Courts expect

➤ *Loughlin v Singh (2013)*:

- The defendant (S) submitted, among other things, that the claimant's (L) care plan in the past had been flawed and the costs of past care and management should be disallowed on the basis that the standard of such care and management fell below what could be expected to meet L's needs.
- Held, to disallow L's claim for the costs of his past care and management 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 in fact received very substantial benefit from such services. To deprive L of all compensation for incurring such costs, whatever the shortcoming in their delivery, would be wholly disproportionate and unjust. **A reduction of 20 per cent in the charges claimed was fair and proportionate** to represent that the objective value of what L received was less than the amount charged for
- But in reality – only an example **however a reminder that there may be forensic examination of the CM's work**



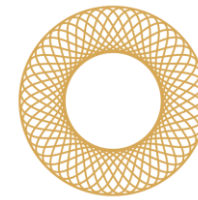
Williams-Henry

- A case about FD
- And criticism from Judge of a number of actors including CM and experts
- ABI with some recovery and CM after liability was agreed
- Judge clearly thought NHS treatment had been effective and good
- Read the judgment - para 67 onwards
- And very direct criticism from Judge



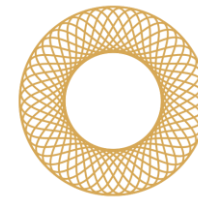
Williams- Henry (2)

- A reliance on a long list from C
- Assertions taken at face value
- And a fully funded rehab package
- Failure to cross reference or filter
- And acknowledge the work of others inc Dr Zoe Fisher
- *A lack of understanding and sloppiness*
- *A blinkered approach ..with really adverse consequences*
- *Some experts criticised too*



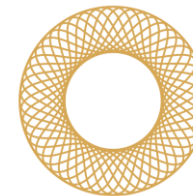
How do you avoid this

- CMs need relevant experience
- And a real understanding of the case
- May need to work alongside NHS provision
- Has to be the clinical judgment of CM not driven by litigation
- And lawyers need to be sure that costs will be recovered
- A tension here – we need good evidence
- And sometimes - a lay perspective as to whether all can be justified ?
- Read the notes
- Should rehab consultants be included more often ?



What should lawyers expect

- Case management is a clinical, not a litigation, role but if you are attending a conference then providing a short summary explaining how the client is at present can be very helpful.
- Boundaries are essential. Lawyers there to give the legal advice and to advise as to what may be appropriate in terms of conduct of litigation or settlement.
- Case manager may need to be aware of what is being advised – but care as to how that is then reiterated to the client
- In practical terms when it comes to reports shorter reports are preferred if possible. Also bear in mind Court may be called on to use them and they may become important contemporaneous evidence which is relied upon.
- Updates should be just that



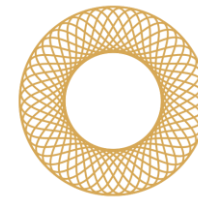
How do lawyers perceive case management

- **To manage the Claimant's rehabilitation and resettlement**
- **To keep us informed as to what is required**
- **To identify what may be required – e.g. interims, equipment, transport, accommodation**
- **To help determine what needs to be done**
- **To implement clinical plans**
- **Good record keeping:**
 - **Identifying Goals**
 - **Interventions**
 - **Ensuring there are good Support worker notes**
 - **Regular reviews with reports**
- **Important for clinical purposes but also important to us for the forensic process**
- **And you may be challenged – see above**
- **And ask for help**
- **Making yourselves available to speak with experts and/or attend conferences when possible.**



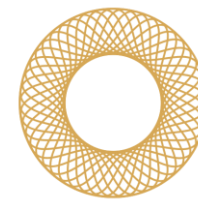
Who should do what

- In the most complex claims there is a need to decide what should be done
 - Whose role ?
 - Liaison between lawyers, families, treating clinicians, MDT and sometimes the Court of Protection
 - Lawyers sometimes need to hold back
 - Advice as to how to manage is a clinical function
 - And although in the context of litigation – best interests is still key
 - Managing competing expectations
 - And delivering as far as can be done



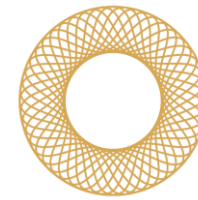
An example

- Catastrophic brain injury
- With perhaps a minimally conscious state
- Often a decision as to whether they can live at home (often the wish of the family)
 - What needs to be done – a plan that all can support
 - Rehab consultant – on a clinical basis
 - Maybe intensive rehabilitation
 - Sourcing a property
 - Finding the right regime
 - Liaising with all
 - Getting interim payments



Interim Funding

- Essential in these cases
- Case managers evidence will be crucial
- But it has to be their view and their evidence
- We as lawyers need to know it is supported by our experts
- But leading much of the decision making will be the case manager
- Experts need to remember they are there to give expert evidence but the case manager is their to make clinical decisions



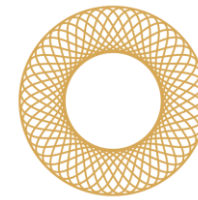
How might this play out

- A plan for rehabilitation may be contested
- Sole instruction
- And not a given that all will be allowed
- See *Salwin v Shahed*
- A case manager will want a plan but the court will need to take account of what D says as well
- It's a point of tension – CM should avoid being at the centre of it
- Generally for the lawyers to manage tension within the litigation
- Whilst remembering the role of the case manager is a clinical one and not a litigation role



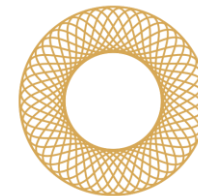
What do we really want

- A case manager with real expertise
- Who has awareness of all the factors that may frame decisions to be made about
 - Placements
 - Family dynamics
 - Working with lawyers and experts
 - And being aware of competing arguments from insurers
- Currency
- And time to manage
- And keeping closely involved



Case managers as witnesses

- Not expert witnesses
- Nor partisan
- Need to explain needs and how they have been addressed
- Will often be very important for a Claimant's case
- Good records will help everyone
- And a good rationale for why decisions have been taken in the case
- And not driven by litigation or lawyers



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