Case No: HQ17PO0116

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

[2019] EWHC 1005 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/04/2019

Before :

MASTER THORNETT

- -

Between :

EF
(ACTING BY HIS LITIGATION FRIEND, GH)

Claimant

- and –

ANNYS JANE DARKWA

First Defendant

THE MOTOR INSURERS BUREAU
(acting through its agent, DIRECT LINE GROUP)

Second Defendant

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Miss Mortimer (instructed by **Novum Law**) for the Claimant
Mr Audland QC (instructed by **Plexus**) for the Second Defendant

Hearing date: 25 March 2019

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JUDGMENT

1. This a personal injury claim arising from a road traffic accident that took place on the 18th of January 2014. The Claimant, who is now aged 45, was crossing the road when he was hit by a car being driven by the First Defendant. He suffered multiple injuries,

including a brain injury. On the 17th of October 2018 the Claimant accepted a Part 36 Offer from the Second Defendant to pay him 85% of the full value of his claim. That settlement was approved by the Court on 29 October 2018 but quantum remains in dispute.

2. On 8th October 2018 the Claimant issued an application for an interim payment of £500,000. The application was due to be dealt with at a hearing on 1 November 2018. However, shortly before the hearing, the Claimant and the Second Defendant reached an agreement whereby the Second Defendant would voluntarily make an interim payment of £225,000 with the claim for the balance of the £500,000 (i.e. £275,000) being adjourned to another date. The Second Defendant has made £900,000 in interim payments to date, including the £225,000 paid in November 2018. The £275,000 contended for now would take the total to £1,175,000.

3. This is the reserved judgment on that adjourned application. It follows a Costs and Case Management Conference where directions were ordered through to listing for a 10-day trial in March 2020.

4. The interim payment application is supported by a large amount of documentation, comprising from the Claimant two ring binders being those for the main CCMC, three further ring binders for the interim payment application and a further bundle provided on behalf of the Second Defendant. Both counsel provided me with detailed skeleton arguments reviewing that material.

5. I am told that the voluntary payment has primarily been used to fund accommodation costs, Case Manager, treatment/therapies, transport costs and the Claimant's "support worker regime". The Claimant's current "monthly spend" is, according to his Solicitors witness statement, £33,182.78. Within that figure approximately £18,000 per month is being spent on case management and support worker costs (i.e. some £215,000 p.a.).

6. The Senior Courts Act 1981 s.32 allows rules of court to provide for interim payments, meaning payments on account of damages, debt or other sums (other than costs) which the defendant may be liable to pay. The discretionary power to order an interim payment is under CPR 25.6. The conditions that must be satisfied before that power is exercised are set out in CPR 25.7. Given the acceptance and approval of the Part 36 offer on

liability, rule 25.7(1)(a) is satisfied : "the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant".

7. CPR r.25.7(4) provides that 'The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.' As the note at paragraph 25.7.1 of the 2018 edition of the White Book says, 'The jurisdiction to order an interim payment is an exception to the general principle that a defendant has a right not to be held liable to pay until liability has been established by a final judgment'.

8. Rule 25.7(4) therefore contains two important limits:
   (i) the court must have regard to what is 'likely' to be the final judgment; and
   (ii) an interim payment may not be more than a 'reasonable proportion' of that likely final judgment.

9. The expression 'reasonable proportion' is not further elaborated in the Rules. In Cobham v Eeles [2009] EWCA Civ 204 Smith LJ said that, 'A "reasonable proportion" may well be a high proportion provided the assessment has been a conservative one. The objective is not to keep the Claimant out of his money but to avoid the risk of over-payment."

10. For reasons elaborated upon below, the issue in this application is whether the balance of the monies sought would risk either overpayment to the Claimant or constitute more than a "reasonable proportion".

11. Although familiar to counsel and the court, and in respect of which there appears no material difference on their application as principles of procedure, it is worth summarising the two stages of analysis in Eeles.

    In "Eeles I", the first task is to assess the likely amount of the final judgment, leaving out of account the heads of future loss which the trial judge might wish to deal with by way of a Periodical Payments Order ("PPO"). This assessment comprises special damages to date, general damages and accommodation costs. However, "Eeles II" recognises there are circumstances in which the judge will be entitled to include in their assessment of the likely amount of the final judgment additional elements of future loss. This can be done only when the judge hearing the interim application can confidently predict that the trial

judge will wish to award a larger capital sum than that covered by general and special damages, interest and accommodation.

12. Focusing a little further on "Eeles II", it is important to note all the heads of damage (future loss of earnings, costs of care, case management, therapies, equipment, increased holiday costs, and Court of Protection costs) that are potentially the subject of PPOs. For the purposes of an interim payment application, the judge should not normally begin to speculate about how the trial judge will allocate the damages. As a rule, he should stop at the figure which he is satisfied is likely to be awarded as a capital sum [Para 37]. The degree of confidence required to predict that the trial judge will capitalise additional elements of future loss so as to produce a greater lump sum must be high. The case for a larger interim payment arrived at by this approach is likely to reflect a case in which the claimant can demonstrate a need for an immediate capital sum [Para 38]. At Para 45 in Eeles, Lady Justice Smith went further to describe this as a mandatory consideration :

"Before taking such a course, the judge must be satisfied by evidence that there is a real need for the interim payment requested. For example, where the request is for money to buy a house, he must be satisfied that there is a real need for accommodation now (as opposed to after the trial) and that the amount of money requested is reasonable…... But the judge must not make an interim payment order without first deciding whether expenditure of approximately the amount he proposes to award is reasonably necessary".

The Claimant's application

13. The Claimant's application summarises the background of the Claimant having suffered a severe traumatic brain injury, together with multiple fractures from his left shoulder to his ribs, his right arm, the lumbar vertebral bodies from 2nd to 5th, his pelvis and his left leg. He had a prolonged inpatient stay first in hospital and then in a rehabilitation centre. He was not discharged home until 2 years and 8 months post-accident. Even when he was discharged home he required a 24-hour support package. He has been left with ongoing physical and cognitive difficulties, which will be permanent. He continues to require 24-hour support.

14. Counsel for the Claimant Miss Mortimer referred me to the report from Ms Clark-Wilson, the Claimant's care and rehabilitation expert, dated 11th March 2019, and her updating letter dated 19.03.19.

15. The Claimant is confirmed to have, and need, support workers 24 hours a day "*in the event he needs any physical interventions to manage his care and support to prevent him from harming himself in the future*". Whilst he (and his fiancée) participate in social activities and musical events, he is said to require "*backup support to enable them to manage*". A Team Leader is employed along with another three support workers. They have noted unpredictable changes in the Claimant's mood with no particular triggers.

16. A list of examples illustrates a wide range of circumstances and responses. Some of the responses have involved expressions to the effect that the Claimant wished he was dead.

    Whilst such expressions are described in the report as "suicidal ideation", at least from this list of examples the distinction between genuine intent and frustrated expression depending upon the particular moment is not entirely clear. For example, on 14th September 2018 the support workers record how the Claimant's mood was "*up and down all day"* in response to his brother dying yet, three days later on 17th September 2018, the Claimant said he was going to starve himself until he died when low in mood and frustrated about doing exercise that he did not like doing. Similarly, the entry 17th October 2018 describes the Claimant as having become "*very angry and shaking when he wanted a soft drink after a concert but most of the shops were closed, and it was suggested to return home".*

17. This not being a mini-trial and the court at this application not having the benefit of oral assistance from medical experts in evidence as it would at trial, it is accordingly not only very difficult but inappropriate to try to interpret the relationship between cause and effect of these recorded episodes, save to note that the Second Defendant's case is that the Claimant has become overly dependent upon his intensive care regime and, according to its experts, that regime is proving counter-productive to him resuming reasonable independence.

18. Ms Clark-Wilson addresses the need for support workers at night. In this regard she notes that, as well as the frequent night waking to use the urine bottle, the Claimant *"wakes*

frequently, he suffers from anxiety and low mood and, when issues have arisen previously (for instance, alarm went off), he does not know what to do. It is questionable whether, if he were to be left alone, what the consequences could be".

19. In her more recent 19.03.19 letter, Ms Clark-Wilson notes the Second Defendant's contention of "learned dependency" but points to the increased complexity and demands of independent living for the Claimant since he left rehabilitative residential care at Rowlands House. For example, a fall experienced at the hydrotherapy pool resulted in illness for "*a significant period afterwards*" and the Claimant became more anxious. In terms of night care and the Second Defendant's contention that there are only modest reasons justifying this, Ms Clark-Wilson provides examples where the assistance of care workers would still be needed. That said, she concedes that this translates more to having care workers "*available to him*" than "*necessarily need(ing) to be with EF all the time*".

20. This observation about the Claimant having accessible assistance rather than constant accompaniment seems consistent with Ms Clark-Wilson's 17.04.18 report where, at Para 5.6 under "Support Workers", she describes how they "*are available to him, as and when he needs assistance, but they do not spend all of their time directly with him, as he also needs to have his own space. [The Claimant] can call his support workers, if he needs them for any reason".*

21. Nonetheless, Ms Clark-Wilson considers there remain clear risks to the Claimant associated with his both his physical and his psychological injuries.

22. By way of recent example of the Claimant's suicidal ideation, Rebecca Max, the Claimant's solicitor, at Para 41 in her statement dated 13th March 2019 mentions a recent[1] incident the Claimant had "*put a belt around his neck and tightened it. He only stopped when he thought of his fiancée".*

23. The Claimant's treating Neuropsychiatrist Dr Michael Dilley describes in a letter dated 11 March 2019 that the Claimant remains at "moderate" risk of suicide although the immediate risk has decreased and the Claimant does not report plans or intent. He describes the "risk management plan" that has been set in place as appropriate and should

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[1] The date confusingly seems to post-date her witness statement but I assume it must still have been recent

continue until there has been some improvement. The monitoring of risk, he notes, is afforded because the Claimant has 24-hour 7 days a week support.

24. Professor Worthington is the Claimant's expert Neuropsychologist. In his Addendum Report dated 10th February 2019 he describes [Para 3.16] the Claimant to be of "*high risk of self-harm and suicide, either intentionally or accidentally".* He supports around the clock care so as to minimise activities that give rise to risk and to react to any sudden downturn in mood "*that might otherwise pass unheeded*". He also considers the support regime appropriate because of the Claimant's physical needs and so as to supervise his daily tasks. The provision of night time care is, in his opinion, justified because the Claimant is not able "*to deal with untoward situations in the home*".

25. Miss Mortimer acknowledged the Second Defendant's arguments as to the need for greater independence but maintains this expectation cannot be achieved overnight. It is a matter for trial to decide a reasonable future care regime, perhaps on the basis of graded reduction. However, the Defendant's challenges cannot fairly be applied to the Claimant's current recorded needs and vulnerability.

26. As to accommodation, following his discharge the Claimant has taken on privately rented accommodation that is more suitable than the second floor 1-bedroom flat in which the Claimant lived with his fiancée before the accident. The 17.10.18 witness statement of the Claimant's Solicitor, Mr Gist, describes the accommodation as providing a certain degree of independence but not being suitable for the Claimant's needs on a long term basis. It is therefore only a temporary solution. In her April 2018 report, Ms Clark-Wilson similarly describes the accommodation as temporary and suitable only for basic requirements. For example, some doorways are not wide enough for wheelchair access and the kitchen does not allow enough turning space. In her more recent March 2019 report Ms Clark-Wilson amplifies the type of accommodation or at least adaptations that would suit the Claimant.

27. The Claimant's total continuing losses are calculated to be at a rate of £33,182.78 per month, excluding additional treatments, therapies or equipment that have been recommended by the Claimant's experts.

28. Following the hearing, Counsel have prepared and agreed a tabulated summary of their respective financial positions relevant to the interim payment considerations and as reflects a trial listing now established to be in March 2020. I annex this as an appendix to this judgment, as they have entitled “Eeles I”.

29. The Claimant contends that, even on conservative basis, he is likely to recover a lump of at least £2 million. Applying a 15% discount to reflect the agreement between the parties on liability gives a total of £1.7 Million. If one reduces this by say 10% to reflect what might be regarded as a reasonable proportion (as per CPR 25.7 (4)), the revised sum is £1,530,000. If the court was to award the “remaining” £275,000 sought in the application then interim payments made to date would total £1,175,000. The Claimant suggests this is comfortably within the “reasonable proportion” sum of £1,530,000. On the above analysis, the Claimant should succeed under “Eeles I” and the court does not need to consider “Eeles II”.

30. For the sake of completeness, however, the Claimant adds that on “Eeles II” is there is a real need for the payment. He will continue to need funds to enable him to continue to pay for his accommodation, his support regime and the costs of his ongoing rehabilitation. Therefore, future costs in excess of £1 million have also been factored into the above calculation.

The Second Defendant’s response

31. By way of broad overview, the Second Defendant’s opposition to the application substantially focuses upon central points of principle rather than valuation of individual heads of loss. On its evidence, the Second Defendant disputes that the Claimant is at any greater suicide risk than he was when staying at Rowland House. It argues that any asserted increase in suicidal expression reflects the Claimant’s overdependence upon the unnecessarily elaborate care regime currently in place. This is not suitable, necessary or appropriate, at the very least, in terms of night-time care. It maintains this has been the case for some time already and it denies this is a case where adjustments in terms of future care are appropriate for consideration at trial, with need being made out in the interim. In his statement dated 21st March 2019 Mr Phillips, the Second Defendant’s solicitor, suggests that had a more reasonable care regime been instigated, the Claimant

simply would not have run out of his interim payments and the funds would have been sufficient through to trial.

The Second Defendant also raises questions of mitigation.

32. Taking matters as a whole, the Second Defendant opposes any further payment and maintains that its voluntary interim payment £225,00 in response to the application sufficiently reflected a more realistic valuation of the entire claim. As already noted, if the further interim payment is made the total will rise to £1,175,000. However, depending upon how the court views the application of the above principles, it contends that the "conservative" basis of assessment mandated in Eeles establishes valuations somewhere between £852,956 and £1,065, 956. Therefore, any further payment would result either in an overpayment or something so close to its maximum valuation as to be negligible and hence in excess of a reasonable proportion.

Mitigation and deduction to reflect inappropriate care regime

33. Having outlined these points of principle, it is perhaps appropriate first to focus on these points.

34. Mr Phillips describes in his statement how the Claimant declined an offer of social housing from Wandsworth Council because they had assessed him in November 2015 (before he left Rowlands House) as requiring a 2-bedroomed property. The Claimant instead wanted a three bedroomed property so to accommodate his carer in a second bedroom and his equipment in a third. Annexed copy correspondence from Wandsworth records the Claimant as insistent that their offer of 2 bedrooms was unsuitable and declined even to view one of the properties offered. A note records the Claimant as having said he did not care if he lost the Council's offer(s) because his "insurance would buy him a three bedroomed property" and so did not want to discuss the matter further. Calls to both the Claimant's solicitor and his fiancée were not productive.

Mr Audland QC, Counsel for the Second Defendant, placed some emphasis upon the contrasting fact that when the Claimant left Rowlands House in September 2016, the

Claimant immediately rented a two-bedroomed property in the private sector and thus incurring the continuing monthly costs as claimed.

35. The Second Defendant similarly maintains that the Claimant has failed to mitigate his loss by not taking up a Care and Support plan offered by Wandsworth Council. In October 2016, the Claimant never took up an offer of £421.36 per week because he would be obliged to make his own additional contribution of £35.90 per week. Had the Claimant taken up this offer, he would have received an additional £20,000 per annum net of his contribution since October 2016. So, by trial in March 2020, the benefit could have been over £68,000.[2]

36. Miss Mortimer referred me to Peters v East Midlands SHA [2009] EWCA Civ 145 at paragraphs 53 to 56 in particular in maintaining that the Second Defendant's arguments are simply contrary to well established authority. A claimant is entitled as of right to choose to pursue the tortfeasor for (amongst other things) sums to cover care, accommodation and treatment rather than having to rely on the statutory obligations of a local authority.

37. As to deduction or discount to reflect inappropriate care regime, the Second Defendant relies upon Loughlin v Singh [2013] EWHC 1641 where, at Para 62, the court reduced the claimant's past rehabilitation costs by 20% to reflect the fact that "the standard of the care and case management services" had "fallen significantly below the standard that could reasonably have been expected". It had not been appropriately managed and had not all been to the claimant's benefit. "The value of what the Claimant received was less than the amount of the charges made for the relevant services".
The court acknowledged there was no precise means of quantifying the appropriate reduction but was clear as to the principle there should be a reduction. It applied 20% as being fair and proportionate.

38. The Second Defendant suggests that the care costs claimed to-date should see an appropriate deduction of 25% at least to reflect the value of the night care that has unnecessarily been provided.

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[2] In the annexed Table, I note the Second Defendant's figure of £60,000 remains based on the assumption at the hearing of a trial date in late 2019. However, its submission remains the same.

The Second Defendant's medical evidence

39. The report from Professor Schapira (Neurology) dated 2nd January 2019 accepts that the Claimant suffered a significant traumatic brain injury from which he has made a generally good recovery but continues to exhibit features of neurological dysfunction. It accepts the Claimant may benefit from a speech and language therapy assessment but disputes that he will require ongoing speech and language courses. From the neurological perspective Professor Schapira would have anticipated the Claimant would be able to transfer independently. He noted how the Claimant uses splints to prevent contractures in his hands but *"In my opinion he retains sufficient function to be able to put these on and take these off himself and I would not expect that he would require help to do this"* (Page 13 / para 77).

    Professor Schipira considers the Claimant's mobility is unlikely to decline and may possibly improve. Even if it fails to improve, he will remain independently mobile within his home for life without a wheelchair (Page 14 / para 78); outdoors he will remain mobile with sticks for short distances – reducing to 100m by 60-65 – but use a wheelchair for longer distances (Page 14 / para 79).

40. The report from Professor Collin (Neurorehabilitation) report dated 3 March 2018 considers the Claimant has the ability to improve his walking speed and consolidate dexterity. Professor Collin considered the Claimant should be moving away from therapy-led activities towards leisure and vocational activities of interest. His emotional and cognitive outlook is currently tipped towards maintenance of a high level of dependency, with repeated reinforcement of the concept of support workers keeping him safe. *"He is possibly hanging on to dependency overnight through concurrent use of upper limb splints that he says he cannot don and doff independently, and dependency on continuous watchful care during the day with expression of low mood and assertions of suicidal intent. The support worker records show that he takes them off without assistance, but usually asks for help to put them back on in the middle of the night"*.

    Professor Collin records how the first case management company appeared much more focused on the Claimant achieving independence *"but staff felt at times that they were*

being "put off" this goal. In August 2016 they recorded this sentiment quite clearly. It is likely that either [the Claimant] or [his fiancée] or both were reluctant to consider capitalising on his recovery by striving towards greater independence".

By way of further illustration, Professor Collin notes how when the Claimant first attended the garden centre at which he had worked before the accident for a few months in 2016 as part of his rehabilitation, he was put in a taxi and went there alone, doing his shift alone. Following the appointment of a subsequent agency and directly employed support workers, the Claimant lost this independence and has been personally taken to the garden centre where they remain to attend him personally. *"If this was a reasoned decision, it could be helpful to review the paperwork associated with the decision making process, or it may have happened by default because there was nothing else for the support worker to do".*

Critically in the context of the timing of such counter-approach, Professor Collin's view is that the failure of the rehabilitation programme to achieve greater independence for the Claimant in a more active way is already well established. Her recommendations are not predicted for experiment at a future date. At Page 42, she comments :

"I find that the rehabilitation programme organised by the case manager has resulted in an extended period of unnecessary dependency for the Claimant that has halted his progress towards independence….he has missed out on the positive benefits of greater levels of independence and self-determination".

41. On the current night time care regime, for example, Professor Collin does not accept the Claimant needs the extended use of splints anymore and so overnight assistance in this regard is not required (Page 41). He is already independently using the urine bottle and only calls support worker after he has used it. The emphasis on his night time needs stands in contrast to daytime activities when the Claimant manages his music collection, puts records on himself and manages his toileting independently.

Again, in respect of an opinion that this adverse predicament is already established, she somewhat trenchantly comments at Page 41 :

"A change in the ethos of care provision towards promoting independence is long overdue.....No challenges means no progress".

42. Express criticism as to the Claimant's current care regime similarly appears in the report from Dr Fleminger (Neuropsychiatry) dated 26/10/18. Dr Fleminger notes how the Claimant "seems more reliant on support now than he was when at Rowland House over two years ago". Dr Fleminger lists examples of the Claimant's independence when at Rowland House from his reading of the care records, including staying in his room, cooking his food or doing his laundry unaccompanied. Similarly, he then would go out with his fiancée in the evening with no suggestion of being accompanied by staff. By the time of his discharge, he was assessed as safe to cross local roads by himself and making his own way to the local shop. Dr Fleminger could find no reports of the Claimant being considered to need regular checking, despite the fact he recorded a suicidal ideation from time to time.

    As does Professor Collin, Dr Fleminger's criticisms focus on the currently established regime for which further interim payment is requested rather than a change as might yet be attempted. Dr Fleminger noted a contrast in the Claimant's care regime following a change in his case management team in early 2017 [Page 24]. Records suggest that since then the case management and MDT team *"have no longer pursued with any vigour the goal of furthering [the Claimant's] independence in terms of having less support. His present team seem much more concerned with potential risks, and less concerned with positive risk taking in order to improve his quality of life. There have been no realistic plans over the last eighteen months to evaluate his risks and consider how they might be mitigated, were he to be unsupported".*

43. As to treatment, Dr Fleminger considers the Claimant needs a care plan aimed at reducing support worker care, improving independence (Page 25) and that will very likely improve his mood. Instead, the care regime over the last eighteenth months has made him more dependent (Page 26). Significantly in this context, whilst the Claimant's suicide risk is "small" over his liftetime, Dr Fleminger is clear that it will not be reduced by 24/7 care for two reasons :
    "...firstly because having a carer in the house he will, with planning, still be able to kill himself should he be determined to do so, Second because the presence of constant

supervision will have an adverse effect on his mood, thus increasing his suicide risk" (Page 25).

44. In her report dated January 2019, Ms Obeten (Physiotherapy) opines that the Claimant already can leave his splints off at night as daytime activity (including hand exercises which he does 4 x per day) has been of more benefit to hand function as opposed to splints at night.

45. Dr Gardner (Neuropsychology : report dated September 2018) also opines that the Claimant has lost a degree of independence he had had and now resorts to 24/7 care. A a measure of learned dependency is apparent (Page 21). He is capable of further learning and greater independence leading to greater self-esteem. There is an ongoing need for a few hours of support a day from a neuropsychological perspective but no night care.

46. Ms Conradie (Care : report dated February 2019) too has come to a clearly expressed view that criticism of the current care regime commences at a point some years' ago. Whilst in the period 2015-2016 at Rowland House the Claimant had made significant progress and achieved some notable independent function (Page 33), and exhibited independent living skills following his discharge from Rowland House, since the change in case manager and carer team in April 2017 "*it is "worrying that [the Claimant's]..overall level of independence has significantly decreased. This is not in his best interests"* (Page 34). She observes that "*he appears to have become increasingly over-dependent on support workers to undertake tasks he previously did independently"*.

She considers that a reduction in support worker input would have a positive impact (Page 36).

Decision

47. As the tabulated comparison between the parties' valuations immediately illustrates, this application is less about material differences of valuation in respect of agreed heads of loss but instead the application of fundamental challenges of principle. This observation

is even more clear now both parties have adjusted their submissions to reflect the trial listing directed at the CMC.

48. The only significant exception is the parties' valuation of General Damages. The Claimant suggests a mid-range valuation within the JC Guidelines "(A) Brain Damage category (a) "Very Severe Brain Damage", whilst the Second Defendant places the valuation within "(c) "Moderate Brain Damage". For the purposes of this application, I accept the Second Defendant's categorisation as the more realistic. Indeed, a classification within the mid-range of the most severe type of brain damage seems difficult to follow on the basis of either party's medical evidence.

49. At the conclusion of the hearing, I expressed a view that the Second Defendant's point on mitigation seemed both important and arguable.

50. I remain of that view. Whilst the principle in Peters was indeed well established that a tortfeasor cannot displace a loss caused by them if the victim chooses not to apply for publicly funded assistance, it did not strike me as obviously dispositive of a submission that the court can still take into account a failure to mitigate where a claimant has received a direct and specific appropriate offer but failed to accept it in circumstances where it would be unreasonable to do so. At least not on the particular facts of this case where (a) the Claimant can arguably be expected to have regard to the fact that 15% of his losses (past and future) are irrecoverable from the Second Defendant and (b) on the face of it, he refused local authority accommodation only then to incur the private expense of accommodation of the same description.

51. I am clear that this distinction is recognised in Peters. The relevant paragraphs relied upon by Miss Mortimer are on closer reading by way of the Court of Appeal's conclusion to a so described "second issue" in that appeal : "*is the claimant entitled as of right to choose damages rather than provision by the Council".* Mitigation was then separately considered as part of a "third issue" : *"was the judge right to find that it was reasonable for the claimant to opt for self-funding rather than provision by the Council".* As to this third issue and mitigation, Lord Dyson (delivering the judgment of the court) commented at Para 89 :

> "There is much to be said for the view that it is reasonable for a claimant to prefer self-funding and damages rather than provision at public expense, on the simple ground that he or she believes that the wrongdoer should pay rather than the taxpayer and/or council tax payer. In other words, it is not open to a defendant to say that a claimant who does not wish to rely on the State cannot recover damages because he or she has acted unreasonably. In Freeman, Tomlinson J came close to embracing this view at [6]. We heard no argument on this approach to the mitigation issue and we express no concluded view about it".

52. I am satisfied that the mitigation point is entirely arguable and one that, taking a conservative approach, I should take into account in assessing what realistic minimum value the claim has for the purposes of this application.

53. In so far as there appeared to me to have been conceptual disagreement between counsel at the hearing whether the required conservative approach applies to a claimant's or a defendant's valuation of the claim, my view is that this is a flexible concept to be applied according to the facts and issues of a particular case. Therefore at least in this context, once the court is satisfied there is a sustainable argument that not all aspects of loss should be recoverable, the court is entitled to have regard to that without still resorting to fine calculation. The broader question is whether the award at trial may well be sufficiently closer to the Defendant's figures as to result in either overpayment or something uncomfortably beyond a "reasonable proportion".

54. Both as a matter of law and on the evidence, I am also satisfied that the Second Defendant has an arguable and fundamental point that the current care regime is open to question. Further, on the Second Defendant's evidence, that challenge commences in respect of significant elements of the past loss to-date rather than a question for trial when assessing compensation for future care.

55. I am very aware and sensitive to the fact that this tension sounds in real financial terms for the Claimant. On his case, he either has or soon will run out of the funds he maintains he needs for care through to trial. Secondly, and by no means in this order, it is said that this care regime is fundamental to the protection of his mental health and stability,

without which his established history of suicidal ideation will be rendered far more vulnerable. I accept this second point is justifiably made on the basis of the Claimant's medical evidence.

56. However, not least by reason of the evidence I have reviewed in some detail above, the Second Defendant's medical evidence presents a very different and equally plausible contrary case. I cannot disregard that and prefer the Claimant's evidence, yielding to an implied threat, even if wholly unintended, that denial of further funding on an interim basis could result in dire consequences. I have instead to observe the fact that the Second Defendant's medical evidence disputes whether some of the care has been or remains necessary at all and how the intense current regime is actually counter-productive to the Claimant gaining greater dependence.

A further point, even if seemingly indelicate to repeat, is the observation from Dr Fleminger at Para 43 above : it is not necessarily true that the current regime actually helps the Claimant to avoid the very risk he relies upon as a central part in his application. It could be making him worse.

57. On balance, I conclude that the proper and objective analysis of the tension between the parties is to ask whether there is a real risk at trial that the judge may conclude that the Claimant's past losses for care and accommodation stand to be reduced by significant margins. I am so satisfied. It follows from that that the Claimant does not satisfy me as to need for the purposes of his application.

58. Once the risk of overpayment is concluded, because the Claimant's proposal is to spend any further interim payment on care and accommodation it seems unlikely that there could ever be any realistic prospect of the Defendant recouping the overpayment or Claimant being able to repay the same. The recognition of overpayment at trial would presumably instead have to be reflected as a credit against the Claimant's future loss award.

Here, I am struck at the broad similarity of this predicament with that identified in Cobham v Eeles as "Eeles II". Whilst the award of the interim payment sought by the Claimant would not fetter the trial judge's discretion as to a PPO, it potentially could still have the same consequence – even if indirectly – upon the adequacy of the Claimant's

future damages award. Satisfaction as to current need or not therefore becomes as much my consideration as it might in a true "Eeles II" case.

59. In conclusion, I am not persuaded it would be appropriate to make any further interim award in this case pending trial. The application is refused.

Costs

60. I leave to the parties to consider what costs orders they might be able to agree and, if so, whether the amount of any such costs can also be agreed. If matters are not agreed, I will list for further hearing as requested.

Appendix "Eeles I"

Head of damage	**Claimant**	**2nd Defendant**
PSLA	£275,000	£175,000
Earnings	£69,324.70	£69,325
Care (gratuitous)	£18,004.28	£8,071
Care paid	£356,650.94	£359,493 (but £419,493 if £60,000 not deducted for failure to mitigate re direct payments
Case Management	£104,946.98	Included in paid care above
Therapies / Treatment.	£83,143.50	£91,004
Equipment	£13,942.03	£18,184
Accommodation	£117,922.45	Nil (but £163,576 max if all allowed contrary to D's primary case
Transport	£8,835	£24,435
Travel / associated expenses	£59,832.64	£59,824
Holidays	£20,600.94	£20,601
AT	£80,675	£1,602

Professional charges	£64,368.76	£114,794
Miscellaneous	£5,287.93	£6,157
Future accommodation	£1,086,725.46 (SG ws 17.10.18 / C's SA para 38)	Nil
Costs between mid - May 2019 and trial in March 2020	Monthly spend of £33,182.78 x 9.5 months =£315,236.41	Already included in D's figures above
Totals	£2,680,497.12	£948,490 (or £1,172,066 on alternative figures as per para 43 of Ds SA)
Calculations	On a conservative basis C will recover lump sum of £2 million X 85% re liability position = £1.7 million X 90% for reasonable proportion = £1,530,000	85% thereof: £875,917 (or £1,065,956) 80% thereof: £700,734 (or £852,956)