

Judgment 63/2003

**Thompson and Le Noury v
Masterton and Bourne
Royal Court
(Civil Action file 628)
1st December, 2003**

Royal Court (Costs and Fees) Rules, 2000 - Convention on Limitation of Liability for Maritime Claims, 1976 – Claims for personal injuries and hull damage – applications for costs by the Plaintiffs against both Defendants and by the Second Defendant against the First Defendant – principles applicable to grant of indemnity costs – separate liability and quantum proceedings – procedure for hearing of expert evidence generally.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

1st day of December, 2003 before Andrew Christopher King Day, Esquire, Lieutenant Bailiff; sitting alone.

In the matter of

Between

JILLIAN THOMPSON

First Plaintiff

and

LEIGH LE NOURY

Second Plaintiff

-v-

MARK MASTERTON

First Defendant

and

ANTHONY ATLANTIS SOLOMON BOURNE

Second Defendant

Whereas on 1st and 2nd October, 2003, the Lieutenant Bailiff considered:

- (i) an application by the Plaintiffs that they be awarded costs against both Defendants on an indemnity basis relating to all Court proceedings arising out of the accident of the 17th September, 1997, alternatively on a recoverable/standard basis;
- (ii) an application by the Second Defendant that the First Defendant shall pay to him his costs of the liability action on a recoverable/standard basis and 70% of any costs which may be awarded against the Second Defendant in favour of the Plaintiffs in relation to the trial on quantum; and having heard thereon Advocates G.S.K. Dawes, A.M. Merrien and M.G. Ferbrache, Counsel for the Plaintiffs and First and Second Defendants respectively;

This day handed down judgment in the terms attached hereto and

ORDERED:-

- (i) The First Defendant shall pay to both Plaintiffs their costs of and relating to the liability proceedings on a standard recoverable basis until 31st December, 2000, and thereafter on a full indemnity basis, save that the First Defendant shall not be liable for any costs which relate to the question of whether the Hull or personal injury actions should proceed first, and that the First Defendant's liability to costs in respect of the question as to whether his conviction was admissible in evidence will be on the standard recoverable basis.
- (ii) The First Defendant shall pay to both Plaintiffs their costs of and relating to the quantum proceedings on a full indemnity basis.
- (iii) The Second Defendant shall pay to the Plaintiffs their costs of and relating to the liability proceedings on the standard recoverable basis until the 3rd May, 2001, inclusive, and thereafter on a partial indemnity basis (if such it be), namely the hourly rate for Advocate's fees is set at £220. Exempt from this order shall be any costs relating to the question of whether the First Defendant's conviction was admissible in evidence.
- (iv) The Second Defendant shall pay to the First Plaintiff her costs of and relating to the quantum proceedings on the standard recoverable basis, save those attributable to determining the question as to what rate of interest was applicable to the Second Defendant's limitation fund, which costs will be on a full indemnity basis.
- (v) The Second Defendant shall pay to the Second Plaintiff his costs of and relating to the quantum proceedings on a full indemnity basis.
- (vi) For the avoidance of any doubt, all orders of Miss Newman LB with regard to costs stand.
- (vii) The First Defendant will pay to the Second Defendant his costs of the liability proceedings, save that the First Defendant may deduct from that amount, firstly, his costs in relation to the question as to which trial was to proceed first, and secondly any costs incurred directly arising from the adjournment of the trial in May, 2001.
- (viii) The First Defendant will pay to the Second Defendant 70% of the costs awarded against the Second Defendant in favour of the Plaintiffs in relation to the trial on quantum.
- (ix) Costs to be taxed if not agreed.

and on the oral application of Counsel for the Plaintiffs for the costs of these costs proceedings ORDERED:

- (1) The Second Defendant pay to the Plaintiffs recoverable costs 70% of which are recoverable from the First Defendant;
- (2) The First Defendant to pay to the Plaintiffs costs on a full indemnity

basis with liberty to apply before 12th December, 2003 to challenge this order.

S.M.D. ROSS
Her Majesty's Deputy Greffier.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

ORDINARY DIVISION

	JILLIAN THOMPSON	First Plaintiff
Between	and	
	LEIGH LE NOURY	Second Plaintiff
	v.	
	MARK MASTERTON	First Defendant
	and	
	ANTHONY ATLANTIS SOLOMON BOURNE	Second Defendant

COSTS

Judgement of Day L.B. on (i) the Plaintiffs’ application that they be awarded costs against both Defendants on an indemnity basis relating to all Court proceedings arising out of the accident of the 17th September 1997, alternatively on a recoverable/standard basis; (ii) the Second Defendant’s application that the First Defendant shall pay to him his costs of the liability action on a recoverable/standard basis, and 70% of any costs which may be awarded against the Second Defendant in favour of the Plaintiffs in relation to the trial on quantum.

Advocate G.S.K. Dawes appeared for the Plaintiffs.
Advocate A.M. Merrien appeared for the First Defendant.
Advocate M.G. Ferbrache appeared for the Second Defendant.

Hearing Dates: 1st and 2nd October 2003
Judgment Handed down: 1st December, 2003

Legislation referred to:-

Royal Court (Costs and Fees) Rules, 1990
Royal Court (Costs and Fees) Rules, 2000
Royal Court Civil Rules, 1989 (“RCCR”)

Cases referred to:-

Belair v. Brouard 1994 17 GLJ 24 R.Crt.
Main v. Laughton 1995 Guernsey Court of Appeal – Civil Appeal No. 215; 20 GLJ 62
Hotel Dunchoille Ltd. v. OGH Hotels (1984) Ltd. 1997 23 GLJ 53 R.Crt.
Quinn v. Brooman 1997 23 GLJ 54 R.Crt.
Hulme v. Matheson Securities (Channel Islands) Ltd. (No. 2) 1997
Guernsey Court of Appeal – Civil Appeal No. 234; 24 GLJ 47
Le Moigne v. Hargetion October, 1998 R.Crt.
Health Investment Ltd. v. Watson - 25/5/1999

Saromaje Ltd. v. Janet Holdings Ltd. - 11/1/2000
Zekavica v. Stefani - 13.4.2000 R.Crt.
Cross and Cross v. Benitrust (C.I.) Ltd. Ramsey, Rose and Rich - 29/11/2000 R.Crt.
Silver Falcon v. Cochrane & others – 8/6/2001 R.Crt.
Woralco (U.K.) Ltd. and others v. Nazarov and another 13/2/2003
Le Pelley v. Waite – 5/9/2003 R.Crt.
Moed v. Cockram R.Crt 03.08.2000
Morton (Champion) v. Paint – Guernsey Court of Appeal 09.02.1996
Hollington v. Hewthorne (1943) KB 587
Cutts v. Head (1984), AER 597
Singh v. Parkfield Group Plc (1996) 14th March. Lawtel

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Introduction

1. In September, 1997, a collision occurred about mid-way between Guernsey and Herm involving two speed boats being driven respectively by the Defendants, the Plaintiffs being passengers in that being driven by the Second Defendant. Both Plaintiffs were injured, the First Plaintiff grievously so. The Plaintiffs instituted proceedings in damages in respect of the personal injuries they had suffered (“the personal injuries actions”). The Second Defendant issued proceedings against the First Defendant for the damage to his boat (“the Hull action”), as also contribution proceedings in respect of the First Plaintiff’s claim only (for historical reasons).
2. On the 2nd August, 2001, after a trial which had lasted some three weeks (with interruptions) in which both denied liability, the Royal Court found the Defendants liable for the injuries, with costs to be assessed, and, as between them 70% to 30%. Prior to that decision, the Court had had to determine two preliminary issues (see this Court’s findings on the order of trials of the 9th March, 2001, and on

the admissibility of the First Defendant's criminal conviction of the 4th May, 2001). On the 9th November, 2001 the Second Defendant obtained summary judgment against the First Defendant in respect of liability (with damages to be assessed) in the Hull action and in the contribution proceedings (to the extent of 70%).

3. On the 20th June, 2003, again after a similarly lengthy and interrupted trial in which both Defendants resisted the amount of damages claimed, the Royal Court awarded the First Plaintiff damages against the Defendants jointly and severally in the sum of £324,824.99, and the Second Plaintiff damages, on the same basis and by eventual agreement of both Defendants, in the sum of £16,000 (in both cases with costs to be determined).
4. This accident having occurred at sea, the two Defendants, as owners and indeed drivers of the vessels, were entitled under the Convention on Limitation of Liability for Maritime Claims, 1976, ("the Convention") to seek to limit their respective liabilities to the Plaintiffs. They applied so to limit liability in September 1998, although it was not until the 15th April, 2002, that such applications were formally approved in principle by the Court (nothing untoward should be read into such delay). The diverting and confusing shadow of the Convention has been ever present in this case, and led to two further applications being made to the Court subsequent to the determination of quantum, relating essentially to the extent of the Defendants' liability (see the judgments of Newman L.B. of July 2003 (costs awarded) and mine of 11th September 2003 (costs to be assessed), which, *inter alia*, identify the distracting issues raised by the Convention.
5. A further equally sombre shadow has also darkened these proceedings, namely the financial position of the First Defendant's insurers, who are based in Belgium apparently. No firm evidence has been produced, but the indication from an early stage was that they were in "run-off" and accordingly perhaps had limited funds available for the payment of claims.
6. That, then, is the merest skeleton of the litigation to which these costs proceedings relate; it will require a great deal more flesh in due course. In that regard, I propose only to note, if not emphasise, what I consider to be the prominent features in what is, seemingly, an almost endless, often monotonous landscape. Thereafter, I shall summarise what I consider to be the main thrust of Counsel's submissions, and then seek to provide the reasoning for my conclusions. The result I fear is depressingly lengthy. Costs are undoubtedly a major issue in this case, not least between the Plaintiffs and the Second Defendant. I variously refer to the parties, their Counsel or as regards the Defendants, their insurers. Without exception, when I refer simply to a party, that must be read as referring to either their Counsel or insurers – it is shorthand. I stress that particularly, because criticisms which I make are on no occasion directed at that party himself or herself; there is nothing personal.

The applications

7. The Plaintiffs' application for costs, formally filed on the 16th of September, 2003, is in the following terms:-

- “1. Subject to paragraphs 2, 3 and 4, the Defendants jointly and severally shall pay the Plaintiffs' costs of and relating to all Court proceedings arising out of the accident of 17th September 1997 (including the interest issue) on an indemnity basis, such costs to be taxed if not agreed;*
- 2. The First Defendant shall not be liable to the Plaintiffs in costs to the extent that they relate to the question of whether the hull or personal injury actions should proceed first;*
- 3. The Second Defendant shall not be liable to the Plaintiffs in costs to the extent that they relate to the question of whether the First Defendant's convictions should be admissible in evidence;*
- 4. The costs order of Lieutenant Bailiff Newman concerning the convention costs issue stands;*
- 5. To the extent that the Court is not minded to award indemnity costs the Plaintiffs' seek an order for costs of and relating to all Court proceedings arising out of the accident of 17th September 1997 (including the interest issue) on a recoverable (ie standard) basis, such costs to be taxed if not agreed.”.*

8. The Second Defendant's application as against the First Defendant, filed on the 26th September, 2003, is also as follows:-

- “1. (This relates to the amount of judgment in favour of the Second Defendant against the First Defendant and is irrelevant to this claim for costs)*
- 2. That the First Defendant shall pay to the [Plaintiffs and] Second Defendant their costs of the liability action.*
- 3. That the First Defendant shall pay to the Second Defendant 70 per centum of any costs awarded against the Second Defendant in favour of the Plaintiffs in relation to the trial on quantum.”.*

Legal principles

9. The relevant parts of Rule 48 of the RCCR provide as follows:-

“48. (1) The Court may in any action

- (a) make such order as to the cost of the proceedings, or of any stage of or application in the proceedings;*

(b) (relates to security for costs)

as the Court thinks just.

(2) (relates to security for costs)

(3) *Notwithstanding the provisions of the Royal Court (Costs and Fees) Rules, 1981 or of any other rule of Court or enactment, the Court may, in the circumstances mentioned in paragraph (4), order that costs (or security for costs) shall be paid on a full or partial indemnity basis.*

(4) *The circumstances referred to in paragraph (3) are as follows -*

(a) *where, in the special circumstances of the case, it is the opinion of the Court that costs should be ordered otherwise than on the basis provided by the Royal Court (Costs and Fees) Rules, 1981; or*

(b) *where any party has pleaded or otherwise pursued or defended an action, claim or counterclaim unreasonably, scandalously, frivolously or vexatiously, or has otherwise abused the process of the Court.*

(5) (relates to taxation – a matter for Bailiff or presiding judge).”.

10. Merely for completeness, I would add that with regard to recoverable costs on the standard recoverable basis, the 2000 Rules, having come into force on the 18th April that year, cover much the greater part of these proceedings. The 1990 Rules (in contrast to the 2000 Rules) make provision for a multiplier of up to four times the amount which would otherwise be awardable in respect of advocates fees as prescribed by those Rules. However, Mr. Dawes did not advance any argument in this regard; nor would there appear to be any merit in doing so as the Rules provide that it is only where the Court considers the proceedings to have been of exceptional complexity that it can so certify a multiplier (not the position by any reckoning in this case). I must emphasise that though I have referred to the 1990 and 2000 Rules, their provisions are not material to my consideration of the issue in this case, which is strictly limited as to whether, in principle, indemnity costs should be awarded, and in which case to what extent – whether in respect of all aspects of the case or merely some of them, or whether full indemnity or partial only. I ignore as a factor of my decision the adequacy or otherwise of what might have been the rate of recoverable advocate’s fees; disbursements and other expenses are common to either basis of assessment. Taxation, and the principles relating thereto, may be for another time.

11. Since the introduction of the RCCR in 1989, the local Courts have had to consider the question of indemnity costs on a number of occasions. It is a field of law in which a body of local authority has started to be established, thus obviating the need, as happens in many other areas of civil law, to refer

to other jurisdictions, and particularly England and Wales, for guidance, not least from the White Book 1999. Nevertheless, I do not discount the merit from time to time of comparing the development of our jurisprudence in this matter (as in any other) with other jurisdictions, not least one which so boldly proclaimed as recently as 1998 that the overriding principle of its rules of court was to do justice.

12. With regard to developing local authority, I would merely mention in passing the cases of Belair, Main, Hotel Dunchoille Ltd., Quinn, Hulme, Le Moigne, Heath Investments Ltd., Saromaje Ltd., Zekaveca, Cross, Silver Falcon, Woralco (UK) Ltd and Le Pelley, in all of which cases, save for Heath Investments, indemnity costs were awarded either fully or to some degree. Those cases were necessarily decided on their own particular facts, all of which, in my respectful opinion, were so clear as to merit indemnity costs being awarded on some basis. Naturally, much the most important of the local cases is that of Hulme, as the Court of Appeal directly addressed the circumstances in which indemnity costs should or could be awarded. In Silver Falcon I subsequently attempted to identify and distil the principles which could be derived from our cases (at pages 5-9 of the judgment). I would repeat them in summary form.

- (i) The discretion of the Court under Rule 48 is unfettered, though it must be exercised judicially.
- (ii) Rule 48(4) is to be read disjunctively, namely (a) separately from (b), (though there may be a conceptual overlap in some cases – Talbot LB in Moed), and similarly the five circumstances identified under paragraph (b).
- (iii) Unreasonableness under (4)(b) does not have to amount to an abuse of process, nor is to be qualified in any way, such as “totally” or “wholly” etc. (See also Saromaje in which the matter is dealt with more fully).
- (iv) The inadequacy of recoverable costs is not essentially a “special circumstance” for the purpose of 48(4)(a).
- (v) Sums of money paid into Court by a defendant which are seriously inadequate may be a “special circumstance” (see Carey DB in Le Moigne, with which decision I would respectfully agree), as also as a factor to be taken into account in assessing unreasonableness in any particular circumstances.
- (vi) The substantive determination of any particular action or issue is not in itself determinative of the question of whether indemnity costs should be awarded, though it may be of some significance.

13. I would add two further principles, the sides of the same coin.

- (vii) It will sometimes be the case that the various stages of, or matters in, the proceedings may need to be separately analysed, and thereafter separately assessed as meriting indemnity costs or not, (as for example in Silver Falcon). So also different issues may require separate analysis. However, in other cases it may be inappropriate for a judge to concentrate too assiduously on all the detail of what has transpired over a period of years so as to lose sight of the wider perspective, the overall general feel as to how the parties, their Counsel and advisors have conducted themselves.
14. I believe a similar structured approach may be equally applicable to the award of standard recoverable costs, if the circumstances so require. This would reflect, sensibly in my view, the recent development of judicial and legislative thinking in England and Wales, without any similar local statutory basis, and falls well within the parameters for judicial legislation as identified in Morton.
15. In this case, there are two defendants against whom indemnity costs are being claimed. I must therefore consider the cases against them separately, at any rate as far as Rule 48(4)(b) is concerned which requires examination of the impugned conduct of the individual litigant. One cannot bear responsibility for the other. So an order for costs, as requested, against “*the Defendants jointly and severally*” is misconceived.

The litigation

16. I must now summarise the whole course of this litigation and related matters in far greater detail, which repeats an exercise I have conducted, to a lesser extent, on previous occasions.
17. For convenience, I divide the litigation into two periods, the first to encompass all matters to the end of the trial on liability (“the liability proceedings”) and the second all matters to date, save for costs (“the quantum proceedings”).

a) The liability proceedings

18. I have already referred to the collision which occurred on the evening of the 17th September, 1997, from which this litigation arose. The “Howlin’ Mad”, owned and driven by the Second Defendant, was proceeding in the direction of St. Peter Port from Herm harbour at about 19.45. The passengers in Mr. Bourne’s boat were Miss Thompson, Mr. Le Noury and a Miss Guillou (now Mrs. Le Noury), and Advocate Eades. In addition, the “Howlin’ Mad” was being accompanied by a Rib which belonged to Advocate Eades but was being driven by Advocate Clark, (then Miss Thompson’s partner and now husband), whose passengers were Advocate Dunster and a Mr. Trickey. Another vessel, nothing to do with that party of eight, was being driven in the same direction by a Mr. Poat. He apparently had left Herm harbour first but soon thereafter both Mr. Bourne and Advocate Clark in the

Rib overtook him. A short distance after leaving Herm (perhaps theoretically associated with the end of the speed limit) the Rib accelerated away from “Howlin’ Mad” towards St. Peter Port, with the “Howlin’ Mad” similarly accelerating (“on to the plane” as it was said) soon thereafter. Not long afterwards the Rib was in near collision with the First Defendant’s vessel “Hi Chaparral” being driven in the opposite direction by the First Defendant, having recently left St. Peter Port to go to Herm. Soon after that near collision, Advocate Clark had cause to re-trace his course as the “Howlin’ Mad” no longer appeared to be following. He was right to do so. “The Howlin’ Mad” and the “Hi Chaparral” had been in violent collision as a result of which both Plaintiffs suffered their injuries. By the time that Advocate Clark and passengers had arrived back at the scene, so also had Mr. Poat.

19. The First Defendant was subsequently prosecuted, and on the 9th February, 1998, after a contested trial, was found guilty in the Magistrate’s Court of driving his boat on the night in question in a manner dangerous to other persons on the sea. In that trial the assistant Magistrate heard (formal) evidence from two police officers, expert navigational evidence from the Deputy Harbourmaster Mr. Anthony Pattimore, and also from eight witnesses of fact on behalf of the prosecution, namely the Second Defendant and Messrs. Clark, Dunster, Trickey, Le Noury, Eades and Poat and Miss Guillou. The First Defendant, in addition to giving evidence himself, also called a Mr. Symons (his passenger) and a Mr. Adrian Ogier (who had no relevant evidence to give for the civil proceedings).
20. The First Plaintiff instituted proceedings in August 1999 against both Defendants, the Second Defendant lodging his defences on the 17th September that year and the First Defendant on the 3rd March, 2000, on which date that action was placed on the Witness List. The action of the Second Plaintiff against the First Defendant was also placed on the Pleading List on the 13th August, 1999, and on the Witness List on the 10th March, 2000. The action of the Second Plaintiff against the Second Defendant was placed on the Pleading List on the 24th September, 1999, and on the Witness List on the 3rd December, 1999 (together the “personal injuries” actions). In essence each Defendant denied personal responsibility, any blame for the accident attaching to the other.
21. The First Plaintiff suffered horrendous injuries, her face being shattered by violent impact with the prow of the “Hi Chaparral”. Those injuries required major surgery on her brain and face which was undertaken at Southampton General Hospital three days after the accident in an operation that lasted for over ten hours, as well major surgery on five further occasions, though four of them were carried out after the issue of the Cause in August, 1999 (the last being on 21st December, 2000). In addition, day surgery had to be carried out on two other occasions. (To understand the full extent of the injuries, and their alleged effects, reference should be made to the Pleadings). The Second Plaintiff suffered a severe fracture of his left dominant elbow.
22. The First Plaintiff claimed in total £227,000, exclusive of interest, the major items of damages being for pain, suffering and loss of amenity (£100,000) past loss of earnings due to delay in promotion

- (£50,000) and a “Smith and Manchester award” (sic) for vulnerability in the labour market (£50,000). The Second Plaintiff claimed £28,000, of which £20,000 was for pain, suffering and loss of amenity.
23. Also in August, 1999, or thereabouts, the Second Defendant instituted the Hull action, as also the contribution proceedings. The Hull action was placed on the Witness List in about March 2000, being a claim in the sum of just under £27,000.
24. Advocate Ferbrache, of Collas Day, is the only Counsel to have remained constant throughout these proceedings. All the others have changed, for a variety of reasons, including the re-organisation of two legal practices. The result was that by November, 2000, or thereabouts, both Plaintiffs were represented by Ozannes, and the First Defendant by Mr. Merrien of Haskins & Co.
25. By the end of October, 2000, the Second Defendant had applied for and obtained a hearing date for the Hull action, namely the beginning and middle of May 2001 (precisely. the 8th, 10th, 11th, 14th to 18th May). The next four months or so saw Counsel for the parties jockeying for position as to the consolidation of the actions and the order of the trials (if I may use that racing analogy). I must, however, emphasise, that the on 17th November, 2000, Advocate P.T.R. Ferbrache, of Ozannes, wrote to both Defendants requesting that they should make admissions with regard to liability, and advising that if that were not to be the case then the Plaintiffs would, in due course, be looking for costs on an indemnity basis. It was only necessary, of course, for the Plaintiffs to establish liability against either Defendant to the extent of 1% to found full liability against that Defendant.
26. By then, indications had been given as to the financial position of the First Defendant’s insurers, that they were in “run off” – they have never said in liquidation.
27. It should also be noted that the First Defendant sided with the Plaintiffs, rather than the Second Defendant, on the question of the order of trials.
28. In the event, the following directions being given on the 9th March, 2001. The separate Plaintiffs’ personal injuries actions were to be consolidated, as also against both Defendants (by consent). They were not to be consolidated with the Hull action (again by consent). The consolidated personal injuries actions were to proceed to trial on liability before the Hull action, on the dates already set aside by the Court for May, 2001, subject to various other directions, to be issued at the same time, being, or being capable of being, complied with. That “listing” decision was appealed by the Second Defendant but upheld by the Court of Appeal on the 3rd May, 2001 (both on the grounds that no fault could be found with the exercise of the judge’s discretion in this matter, and that, indeed, he had been right. Indemnity costs before the Court of Appeal were awarded against the Second Defendant).
29. The Consolidated *Cause reformée* was lodged with the Court on the 23rd March, 2001, the consolidated Defences thereto being filed on the 6th April, 2001, on which date the Defendants were

- ordered to produce their expert reports by the 27th of that month (the Plaintiffs having produced their report by about the end of March).
30. On the 27th April, 2001, I heard argument on the question as to whether the First Defendant's criminal conviction in February 1998 was admissible in the civil proceedings, and if so to what extent. That conviction had been pleaded against the First Defendant both by the Plaintiffs and, as part of his exculpation, by the Second Defendant.
31. On the 4th May, 2001, (the last working day before the liability trial was due to commence) at a further directions hearing, I informed Counsel that I did not, regretfully, as yet even have a draft of my judgment on the admissibility of the conviction, but was able to give them the effect at any rate of my decision, namely that the English Hollington rule had never been, was not or should not be part of the law of Guernsey. I held that the Act of the Magistrate's Court was not merely conclusive evidence of the fact that Mr. Masterton had been found guilty of the offence with which he was charged, but was also admissible evidence, not conclusive, of the fact of guilt of the offence charged against him at the time and place named in the charge. What weight to attach to those limited matters would be for the Jurats at trial, requiring careful directions as of course it would only be the evidence which they heard upon which they could reach conclusions as to liability. I refused to go any further and, as somewhat invited, engage in judicial legislation and adopt the English statutory position or anything similar.
32. At the same directions hearing on the 4th May, 2001, after lengthy discussions of a procedural nature, and mainly relating to the expert witnesses and the form their evidence was to take, it was revealed by Advocate Ferbrache for the very first time (at least to the Court) that his expert witness Captain Spencer was in China, that he would not be back in the Island until the 20th May and would not be available to attend Court until soon after that date at the very earliest, being two days or more after the last day which had been set aside for the trial. In the circumstances, the trial had to be postponed, Captain Spencer's presence throughout being necessary so that any opinions he might have with regard to the conduct of the two drivers (the Defendants), and their responsibility if any for the accident, was based exclusively on the facts which the witness believed to be established at the trial, and specifically not on any other evidence. Mr. Ferbrache further informed me that he had known of Captain Spencer's pending absence for some two to three weeks.
33. The case proceeded to trial on the 17th July, 2001. The witnesses as to fact who gave evidence for the Plaintiffs were Miss Thompson herself (though understandably her evidence in this matter was extremely limited) Mr. and Mrs. Le Noury, Advocates Eades, Clark and Dunster and Messrs. Trickey and Poat. The witnesses as to fact called by the Defendants were the First and Second Defendants themselves and Mr. Symons. In addition, all the parties called their own expert witnesses with regard to navigational matters generally, and to adduce their assessments as to the cause and responsibility

for the accident – namely Captain Trought for the Plaintiffs, Captain Paint for the First Defendant and Captain Spencer for the Second Defendant.

34. With regard to the witnesses as to fact, it should be noted that they were the same (as makes no difference) as those who appeared in the Magistrate's Court trial, and that their evidence was very largely to the same effect as in the Magistrate's Court, though probed that much more closely. Additionally, it should be noted that the evidence of these witnesses also very largely reflected the statements that they had made initially to the investigating police officers. I state this, because all these witnesses, except perhaps Mr. Poat, would have been known to the parties, or at least their Counsel, and, on any assessment, the evidence, realistically, which they originally gave to the police was unlikely to change over the course of time.
35. I would also note that of the expert witnesses, Captain Trought in his pre-trial report, based largely on the witness statements of those called in the Magistrate's Court, apportioned blame equally between the two Defendants, which after hearing the evidence at trial he changed to 60% as to the First Defendant and 40% as to the Second Defendant. (In argument, Counsel for the Defendants made something of this slight change in apportionment. That may have been material to the contribution issue, but it was of no significance in assessing their liability to the Plaintiffs). Captain Paint, called on behalf of the First Defendant, in his pre-trial report painted different factual scenarios (quite rightly) on the basis of which he apportioned blame differently; either the First Defendant was blameless or, alternatively, he was to blame up to some 35%. Having heard the evidence at trial he changed this to 20% responsibility on the part of the First Defendant. Captain Spencer, on the other hand, who was called by the Second Defendant, sat through the whole of the criminal trial and in his pre-trial report attached no blame at all to the Second Defendant. This was a position he maintained having heard all the evidence in the civil proceedings.
36. The trial was completed on the 2nd August 2001, when the Jurats found that both Defendants were liable for the injuries and as between them 70% to 30%. It is not necessary, I think, to state in full exactly what the Jurats' findings were. In summary their unanimous decision was that both Defendants were guilty of every navigational failing alleged against them, comprehensively encompassing look-out, speed, and failure reasonably to avoid the collision. That result was, in my opinion, unsurprising, particularly regarding speed which self-evidently was, on the evidence, the paramount factor.
37. I am told that at about the time of this trial – no greater precision is given – the First Defendant's insurers offered to settle all three claims against its insured for £150,000, inclusive of costs.

b) The Quantum proceedings

38. Amongst the quantity of documentation that has been produced to me for the purposes of these costs proceedings is a file entitled “Party and Party” correspondence”. It comprises what Counsel consider to be relevant correspondence between them in the case (almost entirely between Ozannes and Collas Day), covers the period from November, 1997, to July, 2003, and runs to nigh on 500 pages. I have not to date made much reference to this correspondence in relation to liability, nor do I intend, to any great extent, to do so with regard to quantum. Some reference, however, cannot be avoided.
39. On 21st November, 2001, Advocate Dawes (who had taken over the file from Advocate van Leuven at Ozannes), wrote to Advocates Merrien and Ferbrache regarding their contentions that the amount of liability in this case was limited by the Convention, and asked them to identify what they considered to be the limit of their clients’ respective liabilities thereunder. In January, 2002, Advocate Ferbrache stated that his client’s position was that any limitation fund would represent his client’s maximum exposure, inclusive of the interest element required under the Convention, and rightly identified, in accordance with the provisions of the Convention, that any fund constituted by his client with regard to a personal injury would amount to 166,167 units of account or SDRs (special drawing rights) – in fact 166,667 - and in respect of property damage 83,333. (The units are based on tonnage. The unit total is converted into sterling at the appropriate date and forms the basic sum of a defendant’s liability, to which the prescribed interest from the date of the accrual of this cause of action is to run until the fund is fully constituted).
40. At the end of February, 2002, the Plaintiffs sought directions generally in order to progress the matter toward a hearing on quantum. Coincidentally, but not I believe by chance, the Plaintiffs’ application was made in the knowledge of an application by the Second Defendant with regard to his proceedings against the First Defendant. Mr. Dawes expressly feared that the Second Defendant might obtain a quantified judgment against the First Defendant in the Hull action, and thereby, allegedly, diminish the amount of any limitation fund which the Second Defendant might constitute in favour of the Plaintiffs.
41. Importantly, Mr. Dawes provided both Defendants with a current draft schedule of damages, together with the relevant evidence relating thereto, though observing that his intention was to obtain “*final medical evidence*” on behalf of both Plaintiffs (see his letter 26th February, 2002). I proceed to analyse solely the First Plaintiff’s current claim. That is not to demean the Second Plaintiff’s claim but merely because the former was clearly far and away the more complicated.
42. Appended to the First Plaintiff’s draft schedule of damages were four documents. Appendix 1. (which was to remain the same throughout) helpfully and comprehensively summarised the history of Miss Thompson’s surgery and treatment from the evening of the accident down to October, 2001 (a yet further ophthalmic check-up for double vision in her left eye). It specifically identified the six

occasions when major surgery had to be carried out and the two occasions when day surgery was necessary. The second Appendix related to items of miscellaneous expenditure, the third to absences from work and the fourth to loss of bonuses. The documents contained the notes and reports of all the major items of surgery prepared by the consultant oral and maxillofacial surgeon, Mr. B.T. Evans, with a report from Miss Lang the consultant neurosurgeon, who together carried out the initial lengthy major operation on the 20th September, 1997. This evidence was described by Advocate Ferbrache as being stale. He, in due course, acknowledged that such a description was a misconception of the nature of that evidence, which comprised contemporaneous factual statements relating to the operations which were carried out, with the surgeons' observations thereon.

43. In the original Cause (August 1999), the three principal items of claim, as they remained throughout, related to pain, suffering and loss of amenity, past and future loss of earnings, and amounted to £100,000, £50,000, and £50,000 respectively; the total claim, before interest, being assessed at slightly under £227,000. By February, 2002, the major items of claims have been reduced as follows:- for pain, suffering and loss of amenity to £75,000, for past loss of earning/damage to career to £48,000, and future loss of earnings/handicap to £20,700. The total claim was now £195,000. The draft schedule of damages also updated the treatment which she had received and the developing prognosis since the Cause was issued.
44. At a directions hearing on the 6th March, 2002, Counsel were directed to correspond with regard to the identity, and areas of expertise, of any experts who might be called, at least on the part of the First Plaintiff. On the 22nd March, 2002, the Court also provisionally reserved, and fixed, the whole of September, 2002, for the quantum trial.
45. On the 15th April the Court determined, without argument, that both Defendants were entitled under the Convention to “limit”. The Second Defendant also purported to constitute a limitation fund in a sum of just under £300,000. I use the word “purported” advisedly, as in fact it was not properly constituted with regard to the interest element. The sterling equivalent of the appropriate number of SDRs was correct, but not so the interest element, though it was at the rate which Mr. Dawes had informed Mr. Ferbrache was the relevant rate (8%). Directions were given as to discovery, the exchange of expert medical evidence and schedules of damage. The timetable sought to provide orderly progress to trial, as agreed by the parties, but staged so as to provide the Defendants sufficient opportunity to reply, as appropriate, to evidence received. That the trial on quantum was to proceed in September, 2002, was still very much the objective.
46. Although on the 19th April, 2002, Mr. Dawes informed the Defendants' Counsel of the names of the proposed consultants and, more importantly, their fields of expertise - namely neurology, plastic surgery, psychiatry/psychology, ophthalmology, gastroenterology and orthopaedics (these were in addition to Mr. B.T. Evans) - it became clear by early July, 2002, that the First Plaintiff was not in a

position to comply with the directed timetable with regard to the provision of these expert reports. Mr. Dawes still remained optimistic, however, that the trial could take place in the following September. Over the course of the summer Counsel corresponded about the medical experts and informally agreed a new timetable for exchanging reports – Collas Day were content to await them together, rather than piecemeal – but by the time of a further, short, directions hearing on the 8th August, 2002, the impossibility of the trial proceeding in September was patently obvious. The trial dates were abandoned and the Court stated that it would do nothing further in the matter until receipt of any application made by either party; though Counsel were subsequently directed to list the matter for the 13th December, 2002, (on matters which primarily related to the costs of the liability proceedings).

47. The dates of the expert medical reports produced for the First Plaintiff should be noted. I do not intend to review that chronology in detail. Suffice it to say, in the light of the dates of the reports and the prior consultations with Mrs. Clark, that the First Plaintiff clearly cannot have effectively sought them until March/April 2002. Further, the last report was not forthcoming (significantly, I believe, that of Dr. Leng the psychologist), until mid-October, 2002,
48. On the 12th December, 2002, Mr. Dawes produced the second (and as it transpired almost comprehensive) quantum bundle of documents for both the First and Second Plaintiffs. With regard to the former, those documents comprised an up-to-date schedule of damages, her witness statement again (it had been produced in February, 2002), witness statements relating to the effects which the accident and injuries had had upon Miss Thompson from her (now) husband Mr. Clark, her three brothers and sister, a female family friend and her mother-in-law, together with a statement from the person who effectively had been her boss at Specsavers, Mr. A. N. McClean; as also the medical evidence (that of both Miss Lang – for its neurosurgical aspects – and of Dr. Milln, in vain as it transpired).
49. On the basis of that evidence, the three major items of claim were now assessed as follows:- £100,000 in respect of pain, suffering and loss of amenity (as originally pleaded), £48,000 for past loss of earning/damage to career (the same as in February, 2002), and just over £96,000 in respect of future loss of earnings/handicap (quadruple the assessment of February, 2002). It is inevitable, in my view, and beyond reproach, that for injuries as severe as those suffered by Mrs. Clark, assessments of damages will change, one way or the other, as time passes and the relevant medical evidence and prognosis, on which they must be based, become clearer.
50. The major new element of the medical evidence was in the field of neuropsychiatry and neuropsychology, relating to the extent of the brain damage Mrs. Clark had suffered and the impact thereof. This affected not only the assessment of pain, suffering and loss of amenity, but most specifically future earning capacity.

51. As the latest quantum documents were only produced the day before the directions hearing of the 13th December, 2002, nothing of substance then ensued, save that new trial dates were provisionally booked from the 27th May, 2003, to the 13th June, 2003, those dates being confirmed on the 10th January, 2003.
52. By the 28th January, 2003, Advocate Dawes was able to provide information about the availability of most of the First Defendant's expert witnesses, and the Defendants that they had been able to contact experts in the relevant disciplines and confirm their availability. Thus the Court was in a position, at last, to give precise directions as to the hearing of the expert evidence; the witnesses were to be called in pairs, or "back to back", on the dates specified by the Court. It still concerned the Defendants that their experts had not yet seen (or most of them had not yet seen) Mrs. Clark, and certainly had not produced any reports, and exchanged them with other Counsel and forwarded them to the Court. In early February and again in April, 2003, the Second Defendant made discovery applications, particularly with regard to the First Plaintiff's GP records, for necessary transmission, it was alleged, to the relevant experts.
53. Thereafter, a final updated trial schedule of damages for the First Plaintiff was produced, which differed in some respects from the previous version, but not significantly so. That schedule (and pleadings) had to be further amended, at the direction of the Court, both because they pleaded evidence, in that reference was made to the expert witnesses whose evidence was to be relied upon (or indeed not relied upon); but also because the pleadings in effect had to be re-jigged to remove manifest inconsistencies between the Cause and the latest schedule of damages. Moreover, the Court expressed its inability to understand the logic of the First Plaintiff's claim in respect of future loss of earning capacity, as drafted in paragraph 60 of the latest schedule of damages. This matter was the subject of much discussion with Counsel, both before and intermittently during the trial, to enable the Jurats, in the Court's opinion, in due course, to be directed sensibly as to exactly what the First Plaintiff was claiming in this regard, and more importantly the basis for that claim, i.e. why and how "*the First Plaintiff claims an amount equal to two years net earnings...*" was an appropriate mathematical calculation for it.
54. The witnesses who gave oral evidence at trial were the First Plaintiff, Advocate Clark, Mr. McClean, Mr. B.T. Evans (rightly so, in my view, even though the evidence was agreed) and Doctors Leng and Walton (the neuropsychologists). All the other expert evidence was agreed, as was the witness statement of Mrs. Anderson Brown. The First Plaintiff did not call her relations or female friend. (This was only indicated late in the day, but the Defendants, responsibly, did not seek any adjournment to try and secure their attendance). As already stated, the trial, with a number of unavoidable breaks, lasted for some three weeks.

55. In order to establish the factual bases for their determination of any sums to be awarded to the First Plaintiff, the three Jurats were requested to answer a number of questions, in respect of pain, suffering and loss of amenity, the miscellaneous items of expenditure, past loss of earnings, and future loss of earning/handicap. Those questions are part of the Court record and can be referred to, as can the answers. In the result, the Jurats awarded £100,000 for pain, suffering and loss of amenity, virtually all that which was claimed in respect of the miscellaneous items of expenditure, £48,000 for past loss, and £95,000 or so for future loss (the full amounts claimed), thus arriving at a total amount of £324,824.99, inclusive of interest – very close to the total amount claimed.
56. I turn to the facts regarding offers and payments into Court.
57. In addition to the offer made by the First Defendant at the time of the trial on liability (£150,000 for all three claims against him), by letter dated the 23rd May, 2003 (the last working day before the quantum trial was due to start) he offered the sum of £122,000 in full and final settlement of both Plaintiffs' claims inclusive of costs, that sum, Mr. Merrien said, representing the First Defendant's 70% liability towards them. The First Defendant has never made any payment into Court, or in any other way deposited funds in this jurisdiction.
58. On the same date, 23rd May, 2003, the Second Defendant offered Mrs. Clark the sum of £185,000 in full and final settlement of her claim "... costs would be at large" (which was later explained to mean as assessed by the Court in due course).
59. On the 26th May, 2003 (the bank holiday eve of the trial), the Second Defendant's offer was increased to £200,000 (on the same basis) and Mr. Dawes informed the Defendants that the First Plaintiff would accept the sum of £250,000, to include interest, with costs and disbursements for later determination. (I would interpose in this chronology to stress that such actions by a plaintiff are to be encouraged). On the 30th May, which was after Mrs. Clark had given evidence (in my view credibly and robustly), the Second Defendant increased his offer to £220,000, inclusive of interest but not costs.
60. Whilst the Second Defendant's offer to settle, exclusive of costs, in the sum of £220,000 was unacceptable to the First Plaintiff, Mr. Dawes wrote to Mr. Ferbrache on the 31st May, 2003, which letter included the following:-

"Mr. Merrien has made an offer in full and final settlement of their 70% share of liability (which is misconceived vis à vis the Plaintiffs) inclusive of costs. The figure he mentions is £122,000.... Of course that figure is not nearly enough to satisfy the Plaintiffs' claim for damages, let alone costs; while your offer makes no allowance for costs.

If, however, you would be content for the Plaintiffs to accept your offers of £220,00 and £16,000 respectively (in respect of the Second Plaintiff) and the First Defendant's £122,000

with an agreed extra figure from the First Defendant's money as being attributable to the damages and interest (because we still say your £220,000 is low) with the balance going in discharge of assessed costs and your client paying the balance of the assessed costs (i.e. assessed on the basis determined by the Court) then we may well be able to reach agreement (i.e. in essence the First Defendant's monies would top up the damages/interest to an agreed level with the balance going in part discharge of the assessed costs liability)."

61. No response, constructive or otherwise, was received from the Defendants, either jointly or separately, with regard to Mr. Dawes' proposal, though Mr. Merrien enigmatically informed Mr. Dawes that his client's insurers had "*made clear the financial level which they are prepared to contribute and on what terms.*" The First Plaintiff's earlier offer of £250,000 was withdrawn.
62. The Convention limitation fund of just under £300,000 constituted by the Second Defendant in April, 2002, was not a payment into Court in the normal and accepted sense, as concerns consequences – a matter on which Counsel were agreed – though perhaps it was a sign of good faith.
63. On the day when the Jurats reached their conclusions with regard to quantum (20th June, 2003), Counsel for the Defendants raised the question of Convention limitation, the Second Defendant specifically being concerned to establish what should be the exact amount of his limitation fund, and therefore the extent of his liability, now that judgment had been awarded against him. On the 26th June, 2003, Mr. Ferbrache wrote to the Greffier enclosing a revised application for a decree of limitation, which was then limited to the basic capital sum of £217,926.77, (a figure similar to the Second Defendant's last offer of the 30th May), being the accepted conversion rate of the appropriate units of account or SDRs into sterling as at April, 2002, when the fund was first purportedly constituted and paid into Court, but now shorn of any additional interest element. The Second Defendant's precise revised application for a decree of limitation appears to have been received by the Court on the 8th July, 2003, by which time Newman L.B. had already determined that any costs which the Plaintiffs might be awarded against the Defendants would be recoverable in addition to, and not form part of, any limitation fund established by either of them. Miss Newman dealt with the question of costs (normal recoverable) in respect of that application and I need refer to it no more.
64. The Second Defendant's decree of limitation application necessarily meant a hearing on the question of whether any interest was to run on the basic capital sum, and in which case at what rate. That hearing took place before me on the 28th August and I handed judgment down thereon on the 11th September, costs being reserved for this general review. With regard to this question, Mr. Dawes had sought the assistance of the Law Officers, rightly and understandably, as they have a far greater expertise than lawyers in private practice in unravelling the mysteries of how what I might describe as English delegated legislation can be adopted in this jurisdiction, and therefore have the force of law, – the crux of determining the interest question. By the 11th July, 2003, Her Majesty's learned

Comptroller had written to Mr. Dawes, his letter being copied to both Mr. Ferbrache and Mr. Merrien, in which he stated his conclusion that the appropriate rate of interest in Guernsey was in fact 12%, and provided the reasons why that was so. Both Defendants, therefore, had some six weeks to consider the learning and conclusion of Her Majesty's Comptroller before they argued the matter before me to the contrary, on the 28th August.

65. It is, I think, appropriate to gather together at this stage the various strands relating to the financial position of the First Defendant's insurers, in so far as they have been made known or can be surmised. The lack of information and clarity has been unsatisfactory throughout. No evidence has been produced as to the exact financial position of those insurers. Mr. Merrien repeatedly stated that at no time had his client's described themselves as being insolvent; rather they were in "run-off", so that they were writing no new business and were dealing with claims as and when they arose on existing policies. Thus their potential total liabilities were unquantifiable. In that scenario, the insurers had limited funds to meet these claims. Again, the extent of those funds has never been precisely stated. Whilst the First Defendant made two offers (the first incorporating the claim of the Second Defendant against him as well), and Mr. Merrien has submitted that both those offers were serious assessments of the value of the claims, indications have been clearly given that the funds which could be made available were insufficient to meet all the claims in full (inevitably arising, perhaps, from the "run-off" situation). Additionally, indications have been given that the limit of those funds was reflected in the offers made; see Mr. Merrien's statement to Mr. Dawes which I have only recently quoted, namely that his client's insurers had "*made clear the financial level which they are prepared to contribute and on what terms*"; additionally, Mr. Merrien in his skeleton argument of the 29th September, 2003 (at para. 18) stated that "*it should be noted that the First Defendant's insurers have indicated that they are in run-off and have limited funds available for the payment of claims*".

Counsels' submissions

66. I turn to Counsels' main submissions.
67. Before turning to the liability proceedings, it is right to note Mr. Dawes' submissions relating to "special circumstances" under Rule 48(4)(a). Even though this submission was primarily raised with regard to liability, it has a relevance for quantum as well. The special circumstances he identifies may be stated as follows. The fact that the accident occurred at sea was an all-pervading feature, as it presented a formidable set of circumstances, namely all the implications and distractions of the Maritime Convention, limitation funds and related matters, as well as the order in which the Hull action and personal injuries action should be dealt with by the Court. Allied to which – a further most significant feature – was the financial position of the First Defendant's insurers. If a similar accident had occurred between two vehicles on a public road, Mr. Dawes submitted, claimants would have had

the opportunity of joining in the Motor Insurance Bureau in order to secure their position with regard to financially unsound insurers.

68. Absent of that comfort, and any admission as to liability from either Defendant, the Plaintiffs were at risk if the personal injuries action did not proceed before the Hull action, because in the event that the latter took place first, one Defendant, as between him and the other Defendant, might be cleared of all liability. Whilst that result would not strictly bind the Plaintiffs, it could in practice cause serious problems with regard to establishing liability against the successful Defendant before a different tribunal; if that successful Defendant was the Second, the Plaintiffs could only look to the First's insurers. Additionally, a successful Defendant might have equal claims in part, at any rate, of the other Defendant's limitation fund, if established.
69. As Mr. Dawes put it, if the accident with which the parties and the Court had to deal had involved motor vehicles, it would have been settled years ago.

a) The liability proceedings

70. The Plaintiffs' essential ground for seeking indemnity costs under rule (4)(b) was limited to the allegation that the Defendants had defended the actions unreasonably. Whilst some allegations were made against particular aspects of the Defendants' conduct preceding the first trial, - for example, as against the Second Defendant, failing to inform the Court as soon as Captain Spencer's absence for the proposed liability trial in May, 2001, was known to his Counsel, or, as against the First Defendant, in his contesting the admissibility of his conviction in the Magistrate's Court in February, 1998, - the overriding complaint of the Plaintiffs was that the Defendants should have admitted liability and avoided the costs of any trial on that issue.
71. Both Plaintiffs were innocent passengers in the Second Defendant's boat, and could not have contributed to the accident. The Plaintiffs' allegations against each Defendant, though separate, had common features, the principal of which was that only 1% liability had to be established against either of them to make that party fully liable to the Plaintiffs.
72. The First Defendant had been convicted in the Magistrate's Court of navigating dangerously in breach of the relevant Ordinance on the evening in question. Whatever the state of Guernsey law on the question as to what reliance might be placed by the Plaintiffs on that criminal conviction, it was always highly likely that the facts and circumstances which led the acting Magistrate to convict the First Defendant would also lead the Jurats in the civil trial to making a finding of liability against him. It was the same accident. The particular allegations of excessive speed, lack of proper look-out and the failure to exercise reasonable care to avoid the accident, as fully set out in the Cause, were based on strong and clear evidence which was unlikely to change from that adduced in February, 1998.

73. Additionally, albeit on the 2nd May (shortly before the trial was due to start on the 8th May, 2001), the First Defendant's expert, Captain Paint, had presented various different factual scenarios from which different assessments of liability might follow. On the basis of one such scenario Captain Paint attached no liability for the accident to the First Defendant; on the basis of a different scenario, Captain Paint attached blame to the extent of 35%.
74. For all those reasons, the First Defendant was unreasonable not to make an admission of liability, either immediately after his conviction in the Magistrate's Court on the 9th February, 1998; or soon thereafter when an expert's report should have been obtained taking into account the facts accepted or found proved by the acting Magistrate; or on the 2nd May, 2001, upon the receipt of the report of Captain Paint identifying at least one scenario where he considered the First Defendant to have some responsibility. In due course at the trial Captain Paint gave oral evidence, and by the 27th July, 2001, having heard the evidence of the witnesses as to fact, and stating his assessment thereof, apportioned 20% responsibility for the accident to the First Defendant. That was the absolute fall-back date as far as the Plaintiffs were concerned as to when the First Defendant should have conceded liability.
75. The Plaintiffs' allegations against the Second Defendant, Mr. Dawes accepted, did not have the same force as against the First Defendant, there being in the case of the Second Defendant no conviction for dangerous navigation, and no apportionment by his expert, Captain Spencer, in his pre-trial report, of any liability on the Second Defendant's part (a position which Captain Spencer maintained throughout the trial even after hearing all the evidence). Nevertheless, there was no reasonable prospect of the Second Defendant avoiding a finding of 1% of liability for the accident; in those circumstances he should have accepted the inevitable. Not to do so was unreasonable. The evidential bases for that argument of inevitability were effectively the same, save for the Rib incident, as in the case of the First Defendant. Having failed to obtain the trial of the Hull action first, the Second Defendant, certainly after the decision of the Court of Appeal, should have made an admission of liability.
76. Both Defendants should have conceded liability; thereafter they were free to argue apportionment as between themselves, but without involving the Plaintiffs as parties (as opposed in the case of Mr. Le Noury to being a witness).
77. In response, Mr. Merrien argued, firstly, with regard to the allegation as to taking insufficient account of Captain Paint's pre-trial advice and apportionment of liability, that that advice was on the basis of different factual scenarios which Captain Paint provided; at one end of the spectrum of which he apportioned no liability whatsoever to the First Defendant. It might be that Captain Paint had, after hearing all the evidence at trial, confirmed a different view as to some liability on the part of the First Defendant based on a definitive factual scenario (as far as he was concerned), but that could not

justify any complaint against the First Defendant for following advice which he had received pre-trial, which was the appropriate time to make any concessions as to liability.

78. Additionally, the fact that there was a clear dispute between the First and Second Defendants should not be overlooked. It was the Plaintiffs' decision to seek to be involved, effectively, in the Hull proceedings, seeking to consolidate all issues on liability between all the parties at a contemporaneous trial. Inevitably, therefore, the First Defendant was bound to defend those proceedings to protect his position against the Second Defendant.
79. With regard to what I call the ancillary matters, Advocate Merrien argued, in respect of the consolidation or listing proceedings, that it was in fact his client who first raised the issue of combining all the various proceedings, a position which he maintained throughout and in alliance with the Plaintiffs. Consequently, he argued, all costs associated with that matter should be born by the Second Defendant, though he did not suggest on an indemnity basis. With regard to the admissibility of his client's criminal conviction, Mr. Merrien argued that whilst strictly speaking the Court had ruled in favour of its admissibility in the civil proceedings, and therefore its retention in the pleadings both of the Plaintiffs and the Second Defendant, the scope of that admissibility, and the use to which that conviction might be put, the Court had determined was extremely limited, such that the First Defendant should not be condemned in costs in favour of the Plaintiffs and the Second Defendant who themselves had introduced the conviction into the proceedings.
80. With regard to the abandoned hearing of May, 2001, Mr. Merrien submitted that the responsibility for that lay entirely with the Second Defendant, and that any costs associated by that delay should be borne by the Second Defendant vis-à-vis both the Plaintiffs and the First Defendant, and on a full indemnity basis.
81. The essence of Mr. Ferbrache's submission in response to the Plaintiffs' central allegation against the Second Defendant, was that the expert opinion which it received from Captain Spencer in April, 2001, (the Plaintiffs themselves not having received their expert evidence until the end of March that year) was to the effect that the Second Defendant was not liable at all for the accident. The analysis of Captain Spencer, who had sat throughout the trial in the Magistrate's Court, was that the actions which the Second Defendant took as the First Defendant's boat was approaching were reasonable; he did all that could be expected of a reasonable seaman in the circumstances, and was accordingly neither negligent nor in breach of the International Regulations for Preventing Collisions at Sea. In the circumstances, it was reasonable not to concede liability. (I note in passing that whilst Mr. Ferbrache made much play of his client wishing to proceed with, and thus seeking to obtain a trial date in the latter part of 2000 for, the Hull action, it was not until April, 2001, that he had in fact obtained any expert opinion from Captain Spencer).

82. Mr. Ferbrache’s argument with regard to expert navigational advice was intertwined with lengthy arguments about the appropriate order in which the trials should have taken place. Importantly, the Second Defendant had made it clear, at the latest by March/April 2001, that if the Hull action were to take place first then he undertook to abide by any apportionment of liability which might be established, for the purposes of the personal injuries claims. If that course had been adopted, although the Plaintiffs argued strenuously against it, then the Plaintiffs would not have had to incur all the costs of establishing liability against one or other or both of the Defendants. Indeed, Mr. Ferbrache argued, to use Mr. Dawes’ argument itself, if in the Hull action 1% liability had been established against the Second Defendant, then that would have been sufficient for the Plaintiffs because of the Second Defendant’s undertaking.
83. Further, Mr. Ferbrache courteously and tactfully reminded the Court that whether or not it had been right to order the trials to proceed in the way that it had (it was a fact that it had), it was a matter which could properly be revisited with regard to the costs, which in the event had been unnecessarily, and hugely, expended in establishing liability. The importance of future costs had specifically been stated to be an important factor in the Court’s determination of the listing application.
84. Furthermore, the Second Defendant was itself a plaintiff with regard to the First Defendant, and both Defendants needed to contest the issue of culpability as between themselves.
85. Directly related to this issue was the question of the financial status of the First Defendant’s insurers, a position which was known to the Plaintiffs before they made application that the personal injuries actions should be taken first. That was an additional reason why the Plaintiffs should have left it to the Defendants to argue between themselves with regard to the apportionment of liability; the need for caution on the Plaintiffs’ part was that much greater. And, of course, the costs of the liability action, as it took place in due course, were inevitably that much greater than they would have been merely between the two Defendants.
86. I turn to the Second Defendant’s argument relating to ancillary matters.
87. With regard to the consolidation of the actions and the order of trials, I need say no more. With regard to the admissibility of the First Defendant’s conviction in the Magistrate’s Court, the Second Defendant submitted that costs should follow the event, the Second Defendant being successful, together with the Plaintiffs in this regard. As far as concerned the adjournment of the liability trial set for May, 2001, the Second Defendant’s original written submissions were lengthy, no doubt because at that stage it was thought that the Plaintiffs might be making a claim against Collas Day themselves for a “wasted costs” order. That has not materialised. Accordingly, on this matter, I can simply state that Mr. Ferbrache argued that no order should be made in respect of any costs incurred. The Plaintiffs themselves were not ready to commence the trial on the 8th May, and whether Captain Spencer was available or not was therefore irrelevant. In any event, it was the Plaintiffs themselves

who sought the adjournment of the trial at that time, by insisting that if Captain Spencer be called by the Second Defendant, then it was essential that he was present throughout the trial to hear the witnesses as to fact (a view I fully endorse). Alternatively, standard recoverable costs should follow the event.

88. There is one aspect of the Second Defendant's submissions which I think it is important to note at this stage, and that is this. In his first skeleton argument of July, 2002, with regard to costs, the Second Defendant asserted (at paragraph 2.5) that, though it was an issue strictly in relation to the fund limitation action, any costs which might be awarded against the Second Defendant in establishing liability had to be taken from the limitation fund, and should not form an additional sum to be paid by the Second Defendant to the Plaintiffs (the point which Newman L.B. had to decide). This view was repeated on at least two occasions in the Second Defendant's further skeleton arguments of December, 2002, namely at paragraph 7 where the Second Defendant stated that the hearing of the personal injury action first had been of real little benefit to the Plaintiffs *"but has had a clear and identifiable detrimental effect on all the parties in that it has unnecessarily added to costs and seriously diminished the funds available to pay the claims. It does, however, stand to benefit the Plaintiffs' Advocates in terms of the level of their fees which are substantial. It has seriously diminished the funds available for distribution to the Plaintiffs from the fund to compensate them for their losses."* (That allegation is without foundation and is to be deprecated as being unworthy of any member of the Guernsey Bar). And at paragraph 113 the Second Defendant stated: *"the Plaintiffs' Advocates have brought about a situation whereby the limitation fund will be largely consumed by their costs rather than providing compensation to their clients"*. Thus the view which the Second Defendant was repeatedly and unequivocally expressing – that his limitation fund was the sole source from which any costs awarded to the Plaintiffs against the Second Defendant would come - was clearly in his mind an important factor.

(b) The quantum proceedings

89. I turn now to Counsels' submissions on quantum.
90. As in the case of liability, so in the case of quantum, Mr. Dawes presented a core argument as to why indemnity costs should be awarded. The Defendants had failed timeously or at all to make any realistic offers of settlement, and had made no payments into Court whatsoever. Again, I concentrate on the position of the First Plaintiff. I have already identified the offers which were made - two by the First Defendant and three by the Second Defendant, to which there was one in response and the suggestion of a joint defence offer.
91. It should have been clear to the Defendants, certainly soon after the issue of the Cause in August, 1999, not only that the prospects of either of them escaping liability were negligible, but, because of the gravity of the injuries to the First Plaintiff - a highly qualified graduate with excellent career

prospects - that it was unlikely that damages in due course would be awarded for less than about £210,000, which at that time would have been the approximate total amount of any limitation fund had it been established. The only surprising thing, Mr. Dawes said, was how well (fortunately, all would concur) both Plaintiffs had recovered by early 2002, when the First Plaintiff had provided an up-to-date schedule of damage, her full witness statement and the medical reports of Mr. Evans. That was the time, albeit with further medical evidence still to be produced by the First Plaintiff, to start making serious offers; not least, as the damages claimed had been reduced. Even more so should offers have been made after December, 2002, when (with the exception of the evidence of Mr. Morris and one other) all the Plaintiffs' evidence was to hand and where necessary up-dated.

92. The offers actually made were miserably insufficient, on any reasonable realistic assessment. Even the highest of the Second Defendant, after Mrs. Clark had given evidence, was far below the amount which the Jurats in due course awarded.
93. The Defendants should have made a payment into Court. Written offers without such payment were not sufficient in this type of case, even if the Plaintiffs had failed to beat them, which of course was not the position. For this submission Mr. Dawes referred me to the English authorities of Cutts and Singh, as well as to Le Moigne where Carey DB held that the most important amongst various factors leading to his conclusion that special circumstances applied on the facts of that case, was that the payment into Court by the insurers was "*seriously inadequate*". In this case, of course, there were no payments into Court at all.
94. Additionally, as against the First Defendant, Mr. Dawes argued that whilst the financial instability of his insurers had been revealed in general terms, no further evidence was produced to establish it more clearly. The amount offered by his insurers, it had been indicated, was the limit to which they were able, or prepared to go. Yet no evidence had been produced to establish that under Belgium law, for example, the maximum offer made (£150,000), was all that was or could be available.
95. Mr. Dawes accepted that some complaints against the First Plaintiff for failing to comply during 2002 with the Court's directions in an attempt to proceed to trial in September of that year were justified, though the resultant delay had caused no prejudice to the Defendants. However, it would be equally fair to point the finger at the Defendants, in that, certainly in the latter part of 2002 when the areas of expertise in which medical evidence was to be sought by the First Plaintiff had become clear, they themselves did not start to instruct experts in those or any relevant disciplines. In addition, Mr. Dawes complained of what he described as the Defendants' obsession, particularly in early 2003, for wringing out of the First Plaintiff every considerable medical record (which were of little if any significance as events proved, or could ever have been). Greater effort should have made to agree expert evidence in certain fields (for example plastic surgery and gastroenterology) upon which the Defendants themselves did not even obtain their own evidence.

96. As for the criticism that the pleadings, particularly relating to future loss, were the subject of much later argument in Court, it was right to point out that the Defendants had never sought more details of the basis for that (or indeed any) part of the claim.
97. In response, Mr. Merrien submitted that in comparison to the amounts being claimed at the time, the First Defendant's offers (i.e. in July, 2001, and May, 2003), were not miserably insufficient. As for the allegation against the First Defendant that he failed to co-operate with the Second Defendant in making a joint offer, that was a misconceived criticism for which Mr. Dawes had no evidence. Any discussions which took place between the First and Second Defendants were subject to legal privilege. Further, any implied allegation that the First Defendant did not accept the Plaintiffs' counter offer (i.e. the sum of £250,000) was not capable of supporting an application for indemnity costs.
98. With no disrespect to them, I can take together the major thrust of defence Counsel's submissions, which was a close analysis of the events as they had, or as pertinently had not, unfurled after the conclusion of the liability trial, being the context in which the criticism of failing to make offers timeously had to be placed
99. When the chronology was analysed, it was clear that criticism at the lateness of the offers was unfair and unfounded.
100. From early August, 2001, until the very end of February, 2002, the Plaintiffs took no material steps to move forward their claims. The medical evidence which was then produced was of a limited nature and, in Mr. Ferbrache's submission, extremely stale. (I have already commented on the question of staleness in this regard and Mr. Ferbrache's acceptance that that allegation was without foundation). What was important was that the only evidence at that stage, which was in any way of a neurological nature, was that provided in the report of Miss Lang of the 9th August, 1999, wherein she had made limited reference to the existence, or otherwise, of some brain damage being suffered by the First Plaintiff. Clearly, if there was such brain damage, then it was likely to form (as indeed it did) a major aspect of the quantum claim, both with regard to pain, suffering and loss of amenity, as also to loss of future earnings. It was unclear how the First Plaintiff could have thought it possible to quantify her claim seriously in early 2002 on the basis of such inadequate evidence. Certainly, it was not reasonable to expect the Defendants to be in a position to respond in any meaningful way, not least because the First Plaintiff had indicated that further medical evidence would be forthcoming.
101. The First Plaintiff's failure during the course of 2002 to comply with the directions of the 15th April, 2002, which largely related to the production and exchange of expert medical evidence, resulted in the postponement of the September, 2002, trial. The Defendants were criticised for not having made any expeditious approach to medical experts during the course of 2002. Yet it had been indicated by the Defendants on more than one occasion that, until the true position was known, not only as to the

identity of the experts but more importantly the contents of their reports, the Defendants could take no constructive action. It took most of 2002 for the First Plaintiff to produce that medical evidence. In any event, it was accepted that the medical evidence should not be provided piecemeal.

102. Nevertheless, the Second Defendant, as Mr. Ferbrache pointed out, had taken the sensible and fair course of constituting a Convention limitation fund, and deposited a sum of just under £300,000 with the Court (being the amount in fact which the Plaintiffs themselves had quantified, in the event inaccurately, as being the correct sum).
103. It was the Court itself which fixed the further directions hearing for the 13th December, 2002, and it was only the day before that the First Plaintiff produced all her medical evidence for consideration by the Defendants. The matter necessarily had to be further adjourned to the 10th January, 2003, and even by then there remained non-compliance with the Court order of April, 2002 (in particular the evidence of Mr. Morris the ophthalmic surgeon had not been served). Additionally, reliance was still being placed upon the psychiatrist Dr. Milln, even though he was going to be on six months sabbatical and unable to attend the trial, the dates for which had now been set by the Court. Similarly, reliance was still being placed on the October, 1999, report of Miss Lang, although again there was no intention to call her as a witness. Indeed the First Plaintiff subsequently served further evidence which partly contradicted that of Miss Lang (in respect of brain damage).
104. Further, the First Plaintiff failed to recognise, and to implement, her continuing responsibility for discovery, not only of her employment records but most particularly of her medical records, for which the Defendants had repeatedly to press during the early part of 2003. These were all necessary for the Defendants' experts, so that they could give their opinions against as full a factual background as possible, a position which the Defendants' neuropsychological experts, in particular, had made clear.
105. It had only become clear by the end of 2002, though the Second Defendant had had his suspicions much earlier, that the neurological aspects of the case were assuming major significance. It was only from early 2003 onwards that the Second Defendant was in a position to start grappling with them. Indeed, Professor Trimble (the replacement neuropsychiatrist for Mr. Milln) did not produce his report until the 1st April, 2003, and Mr. Morris the ophthalmologist did not produce his report until the 2nd May, 2003 (though it supposedly had been ready in 2002).
106. Without the full range of evidence, any attempt to compromise the action was unrealistic.
107. The Plaintiffs refused to agree some of the Defendants' medical reports, and insisted upon the primacy of their own experts' reports. Indeed, in the case of Mr. Evans, the First Plaintiff insisted on calling him to give evidence even though a joint report had been agreed with the Defendants' expert Mr. James, whose attendance for the relevant part of the trial was thus necessitated. The neuropsychologists, Messrs Walton and Leng, had prepared an agreed statement, but that was

- unacceptable to Mr. Dawes. Thus both experts had to give evidence in full, which formed a significant part of the hearing.
108. Even in the May, 2003, the First Plaintiff either needed, or was directed, to consider making amendments to her pleadings, particularly with regard to future loss of earnings.
109. In all these ways the Plaintiffs, and in reality the First Plaintiff, was seriously at fault in conducting the proceedings; most certainly sufficiently so that costs should not be granted on any indemnity basis.
110. As far as the Second Defendant was concerned, there was no justification in the criticism that he should have made offers earlier. The fault for any delay rested with the First Plaintiff. In addition, Mr. Ferbrache argued that his client had been further hampered by the First Defendant's failure to constitute a fund, whether partially or fully, or indeed to state clearly how much his insurers could and would make available.
111. With regard to the amount of the Second Defendant's offers, Mr. Ferbrache honestly accepted that his client had been wrong in his assessment of the claim (even with leading Counsel's advice). The assessment of £55,000 for pain, suffering and loss of amenity was only somewhat over half of that which the Jurats awarded (the full amount claimed), but the Second Defendant's offer had been clearly based, as was drawn to the Court's attention, on what were reasonably thought to be comparable English cases. Similarly the assessment for future loss of earnings, and the overall amount offered, was seriously short. That failure of judgment, however, did not itself impugn the Second Defendant's conduct generally in conducting his defence, such as to justify the award of indemnity costs. As Mr. Ferbrache put it in his e-mail to Mr. Dawes of the 31st May, 2003, "*we accept that the Court's assessment might differ as that is the nature of litigation*". It should also be noted that the Second Defendant was not in a position to produce a counter schedule of damage until the trial was well underway (a point with which I sympathise).

Conclusions

112. In my consideration of the Plaintiffs' application to be awarded indemnity costs for the whole of these proceedings (with two minor exceptions), Mr. Dawes urged me to "take the big picture". Whilst ignoring the terminology, I accept the concept. This is certainly a case where it is more appropriate, and more rewarding judicially, to take an overall view of the battle rather than becoming too bogged down in the details of the trench warfare. Nevertheless, I still think it desirable to consider the liability proceedings separately from the quantum proceedings, though there are certainly common threads to both, predominantly the allegation that both Defendants have unreasonably defended the proceedings, as provided in Rule 48(4)(b). "Special circumstances" are also prayed in aid by Mr. Dawes under Rule 48(4)(a), and I turn to those first.

113. I agree that the circumstances which Mr. Dawes identified, namely that the accident occurred at sea (with all the ramifications and distractions of the Convention) and the financial position of the First Defendant's insurers, were unusual features of much unhelpful significance.
114. The fact that the accident occurred at sea does not, in itself, in my opinion amount to a special circumstance for the purpose of Rule 48(4)(a). Otherwise all litigation involving such accidents would be likely to attract indemnity costs, which as a statement of principle cannot be correct. The fact that theoretically the Court was exercising its admiralty jurisdiction was not a complication in relation to establishing either negligence or quantum, as the principles are the same whatever theoretical jurisdiction the Court is exercising. (That equally applies to the order of trials, notwithstanding the English practice identified in Marsden and repeatedly referred to by Mr. Ferbrache, in my view misguidedly). There was, however, one uncertainty arising from the Convention which lingered ominously throughout the proceedings, namely the extent of the Convention liability of the Defendants, two aspects of which required judicial decision. With hindsight, it was perhaps a mistake not to have resolved those issues at a much earlier stage in the proceedings, for which the Court must bear as much responsibility as Counsel. It was an area where all were inexperienced.
115. The financial standing of the First Defendant's insurers is more complicated and unsatisfactory, not least through lack of clarity. I have already stated (at the conclusion of my summary of the litigation) the limited extent of the information I have been able to glean about it. There should have been greater openness, indeed honesty. That financial standing at the very least was an important factor which had to be taken into account throughout the proceedings, by the Plaintiffs, the Second Defendant and the Court. It was an essential part of the background, together to a much lesser extent with the Convention aspect, against which I have to judge the unreasonableness or otherwise of both Defendants' conduct in defending the claims against them for the purposes of Rule 48(4)(b) (though for contrasting reasons).

(a) The liability proceedings

116. On this matter, the crux of my assessment must be whether either or both of the Defendants should have conceded liability and therefore avoided a trial. There are two central considerations, common to both Defendants; firstly, the limited extent of the liability which the Plaintiffs had to establish against a Defendant, namely 1%; and secondly there was the question, as between the Defendants, of apportioning blame, if any. This in truth was of no interest to the Plaintiffs – what basically concerned them was to try and ensure that some liability was established against the Second Defendant (the only adequately insured defendant). Thus it was legitimate, if no admissions were to be made by both Defendants, to seek to ensure that dual liability was established, to whatever minor extent. A criticism I would make against both Defendants is that they failed to appreciate (as

illustrated by their submissions) that the two considerations (of liability and contribution) should have been analysed separately. It would be wholly unnecessary for the personal injuries actions to proceed in order to establish contribution if some liability, however small, was inevitably going to be established against both; in that scenario, apportionment could be left to the Defendants alone.

117. The case against the First Defendant, that he should have conceded liability, was a strong one, indeed I would say overwhelmingly. It was not the fact of his conviction in February, 1998, that I consider to be of significance; rather it was the fact that the evidence against him, from many sources, in respect of his navigational negligence, and breaches of the International Regulations, was known, almost unchallengeable, and unlikely to change. The near collision with the Rib should have been sufficient warning to the First Defendant (as Captain Spencer put it, it should have “*sharpened him up*”). All aspects of his alleged failings in the conditions, twilight, as pleaded in the Cause – a wide range indeed, importantly covering speed, lookout and failure to take appropriate action to avoid a collision – were likely to be proved.
118. The only possible factor which might have militated against that basic evidential assessment was the one hypothetical factual scenario presented by Captain Paint in which he attributed no liability; but on another he had accepted that some blame attached to the First Defendant (35%).
119. In my view it was unquestionably the duty of the First Defendant’s advisors, in truth his insurers, to stand back and analyse properly the factual scenarios and the overwhelming strength of the evidence against him (including the views of the other experts). If they had done so, there was only one reasonable conclusion they could have come to. That 1% liability would be established was as virtual a certainty as makes no difference. The proper and only reasonable course was for him to concede liability as against the Plaintiffs. The question of contribution/apportionment was one between him and the Second Defendant, in the separate proceedings. They did not require, should not have involved, the Plaintiffs as parties (as opposed to witnesses perhaps).
120. Although I need no further persuading, there is another factor to take into account. If it was the position, which I believe I am entitled to assume that it was on all the information before me, that the First Defendant’s insurers would not voluntarily, or could not, make more than about £150,000 available to settle all three claims against its insured, as offered about the time of this trial (itself a totally inadequate sum by any reckoning, as was the £122,000 later offered for just the two Plaintiffs), why did the insurers waste what was purportedly its limited assets in resisting the Plaintiffs’ claims on liability, and require the Plaintiffs to incur irrecoverable expenditure (as against that Defendant) when the chances of resisting successfully were so negligible?
121. The First Defendant defended the liability proceeding unreasonably – indeed if it was necessary to do so, which it is not, I would describe that conduct as perverse. The Plaintiffs have persuaded me that, in principle, they are entitled to full indemnity costs against the First Defendant on liability.

122. The questions then arise; for what period and with what exceptions? The Plaintiffs rightly make no application, as against the First Defendant, with regard to the costs in relation to resolving the question of whether the Hull or personal injuries actions should proceed first. This matter is therefore excluded from the order.
123. The second matter is the admissibility of the First Defendant's conviction, as evidence in the civil proceedings. On this I have sympathy for the First Defendant, notwithstanding my observations that his insurer's financial position militated against taking points unnecessarily. It is true that the Plaintiffs and Second Defendant were successful in persuading the Court that the Act of Magistrate's Court was conclusive evidence of the fact that Mr Masterton had been found guilty of the offence with which he was charged, and also admissible but not conclusive evidence of the fact of guilt of the offence charged. The conviction had no further evidential value directly or indirectly. Indeed the Plaintiffs at trial did not seek to rely upon it in any way at all, and the Second Defendant only to a very slight degree. If the Plaintiffs and Second Defendant had properly analysed the position initially (as I believe they duly did during argument), they might well not have pleaded the criminal conviction. In those circumstances, I do not think it is just to condemn the First Defendant in indemnity costs (as opposed to standard recoverable) for defending a point which was misguidedly, or at least unnecessarily, pursued.
124. In November, 2000, the First Defendant was put on notice as to costs (as was the Second) with regard to failing to concede liability. Taken in the round, I think that all costs incurred by the Plaintiffs after the 1st January, 2001, until the end of the liability proceedings (save for the two matters which I have already excluded) should be on a full indemnity basis as far concerns the First Defendant. By that time, his insurers should have properly assessed the situation.
125. I turn to the case against the Second Defendant.
126. The starting point must again be to assess the strength of the evidence against him. Admittedly he was not involved in any earlier incident. But the witnesses were known. Their evidence was known. It had been known since early 1998. It was unlikely to change in any material respect. It included, importantly, the evidence regarding speed of Mr. Le Noury (certainly), Advocate Eades, and to a lesser extent, Mrs. Le Noury and Mr. Poat. There was the evidence of Mr. and Mrs. Le Noury, and to an extent Advocate Eades, regarding the actions taken by Mr. Bourne immediately prior to the accident. Was their evidence ever seriously going to be challenged so that a case would not be made out, bearing in mind that it was twilight, with regard to excessive speed, improper look-out, failure to take reasonable steps to avoid the accident and all the alleged breaches of the International Regulation so as to establish negligence and liability? On any assessment, the evidence was strong and, in my view, only likely to get more damning as far as the Second Defendant was concerned. *Res ipsa*

loquitur had been pleaded but was not pursued at trial, perhaps because the extra allegation was otiose and unnecessarily distracting. In my view it succinctly encapsulated the case.

127. However, it has to be accepted that the Second Defendant had to take into account the advice of his expert Captain Spencer, though his opinion was obtained, for whatever reason, exceedingly late. (He seems to have replaced Captain Barton as the Second Defendant's expert). That advice was clear. The Second Defendant bore no responsibility for the accident. Even if his insurers took the same view as I do as to the clear-cut nature of the evidence against him, I appreciate that it would be unusual to overrule or ignore your expert's advice.
128. There is a further factor. It was not unreasonable for the Second Defendant, in my view, to seek to persuade the Court that the Hull action should be heard first, particularly in view of his undertaking to be bound, in the personal injuries actions, by any decision. The financial position, as far as it was known, of the First Defendant's insurers certainly placed the Second Defendant in an invidious position. Only, realistically, if the Second Defendant was found to be without fault, could his insurers avoid approaching 100% liability for all aspects of the Plaintiff's claims. Proper contribution by the First Defendant was more theoretical than practical. That faultless result was more likely to be achieved in an action limited to the Defendants (though subject to any subsequent personal injuries action). I would merely repeat that the financial position of the First Defendant's insurers also placed the Plaintiffs in an invidious position – they could not run the risk of the Second Defendant avoiding liability in any action in which the Plaintiffs played no part. The Court, however, saw the justice of the case differently from the Second Defendant. As Southwell JA, with respect, made the position abundantly clear in the Court of Appeal (at p.2G):-

“The Personal Injuries Action is the more important of the two actions. In the Personal Injuries Action all the issues or all the important issues will be decided as between all four parties on the basis of evidence called on behalf of all four parties and tested by cross-examination on behalf of all the other parties. If the Hull Action (in which only Mr. Bourne and Mr. Masterton are parties) were to be tried first, that would not resolve any of the issues raised by those who were injured and who sue in the Personal Injuries Action. It is clear in the judgment of this Court that the Personal Injuries Action ought in any event to be tried first, with the trial starting on the 8th May 2001.”

129. That judgment of the Court of Appeal was given on the 3rd May, 2001. As already stated, the trial could not proceed on the 8th May as originally scheduled. For the purposes of these comments, I ascribe no blame to anyone for that. The point is that the Second Defendant now had many weeks in which to take proper stock of his position. It is clear to me from all that has happened since the conclusion of the liability trial (as well as before), that the Second Defendant has been misguidedly obsessed with the decision that the personal injuries actions should proceed first; he should not have

been, for the reasons stated by Southwell JA. The Second Defendant continued unreasonably to be distracted by the apportionment issue (to revert to the criticism in respect of both Defendants to which I alluded at the beginning of this section of my judgment). The position which the Second Defendant now had to address was that battle was to be joined with the Plaintiffs. That was the issue which properly had to be analysed. Whilst the approaching trial could no doubt determine all issues of liability, the essential matter was the Plaintiffs' case against the Defendants. What chance was there of the Second Defendant being found blameless in that context, in view of the strength of the evidence, notwithstanding the advice received from Captain Spencer, though I acknowledge the difficulty of gainsaying it?

130. I believe the Second Defendant's insurers should and could, rightly, have taken the view that the importance of the expert evidence related far more to the apportionment of blame than to establishing any blame at all. The causes of the accident vis-à-vis the Plaintiffs would be abundantly clear to the ordinary and fair-minded person, conversant with the facts. The Plaintiffs' case was not one where Jurats required assistance from an expert to help explain or interpret the facts, save to a minimal extent (e.g. if on a reciprocal course, steer to starboard). The question of contribution should have been determined between the Defendants without involving the Plaintiffs.
131. Accordingly, I am driven to conclude, after much thought, that it was unreasonable on the part of the Second Defendant not to appreciate that a tribunal of normal, reasonable persons would inevitably find some fault on his part vis-à-vis the Plaintiffs. Thus liability should have been conceded and a trial avoided on that issue. I acknowledge that to make such a concession would result in the Second Defendant inevitably and effectively assuming 100% liability without a contest. That result, however, was going to happen anyway if the Plaintiffs established any liability at all. Consequently the Plaintiffs have persuaded me that they are also entitled, in principle, to indemnity costs against the Second Defendant in respect of the liability proceedings.
132. However, the conduct of the Second Defendant in resisting liability cannot be censored with the same force as that of the First Defendant. Indeed I have some residual sympathy for the position of the former. Accordingly, the indemnity costs to be awarded against him are to be of a partial not full indemnity basis. What this means in practice is that there should be an enhanced hourly rate for advocate's fees, recoverable from the Second Defendant. For those purposes, those fees will be set at £220 per hour, which is a substantial uplift (about one third – whether it equates with the contractual rate as between the Plaintiffs and their Counsel I have no idea); nor does it infringe upon the responsibilities of anyone who may in due course have to carry out taxation.
133. Those indemnity costs will apply to all proceedings from the 4th May, 2001 (inclusive) until the end of the liability proceedings. That day is not taken solely because it falls immediately after the judgment of the Court of Appeal, although that is an important factor. Rather it is because there was

then a lengthy directions hearing for the purpose of preparing for the trial on the 8th May (as had been scheduled). It was only towards the end of that hearing that it became clear that Captain Spencer was in China, and thus would be unavailable. Mr. Ferbrache had been aware of his expert witness' absence sometime before that directions hearing; he says some fortnight before. The trial dates had been known since the previous November/December. As a sign of my displeasure with the conduct of the Second Defendant in this regard, the indemnity costs are to apply to, and run from the date of, those proceedings.

134. The final question I have to determine at this stage is what order would be appropriate in respect of the hearing on the order of trials. Whilst I am strongly critical of the Second Defendant for the stance which he has continued to adopt since the decision of the Court of Appeal, as already indicated I do not think he was unreasonable in seeking to persuade the Court that the Hull action should proceed first, particularly in view of the financial position of the First Defendant's insurers. It was certainly not sufficiently unreasonable conduct of the defence to found an award of indemnity costs (though of course the pursuit of an appeal against my decision was not so sympathetically viewed). In summary, therefore, the Plaintiffs are awarded costs against the Second Defendant on a standard recoverable basis to the 3rd May, 2001, (save for those relating to the admissibility of the First Defendant's conviction, which are not claimed), and thereafter on the partial indemnity basis.

(b) The quantum proceedings

135. The sole allegations of the Plaintiffs against both Defendants in this regard is that they failed timeously or at all to make any realistic offers of settlement, and made no payments into Court. Those allegations overwhelmingly related to the position of the First Plaintiff, upon which I concentrate first.
136. I turn immediately to the case against the First Defendant. His offer in the middle of 2001 of £150,000 was in respect of all three claims against him, inclusive of costs. Even allowing, as a rough and ready hypothetical apportionment, and being kind to the First Defendant, £50,000 in total for the Hull action, Mr. Le Noury's claim and costs, only £100,000 would be left to settle Miss Thompson's claim (and costs). Although as yet no medical evidence had been provided relating to Miss Thompson's injuries and the prognosis thereof, the extent of those injuries were fully identified in the Cause, and were unlikely to be seriously challenged, if at all. By any standards those injuries were grievous, for which proper compensation for pain, suffering and loss of amenity would no doubt approach or exceed £50,000. The sum claimed for past and future expenses and for the cost of future treatment (£25,000) was unlikely to be far out. Again, no details have been produced to support the alleged past loss arising from delay in promotion, or in respect of her future vulnerability in the labour market/loss of earnings. Nevertheless the First Defendant's insurers would certainly have

been generally aware of Miss Thompson's abilities (and if they had not made the necessary inquiries so to inform themselves, they fell well below the standard of a normal prudent insurer).

137. The amount offered to Miss Thompson, on my hypothetical basis, fell far short of the current overall claim of £227,000 (the relevant comparator in 2001 for the purposes of Mr. Merrien's argument). In my judgment, on any analysis the offer of £150,000 in total was woefully inadequate, and unreasonable if it was meant even at that stage to incorporate a serious assessment of the severity of Mrs. Clark's injuries and their impact. On the other hand, one would be entitled to take the view that as there was a lack of evidence with regard to the injuries and most especially the claims for past and future loss of earnings, there had been no serious assessment at all of the value of Mrs. Clark's claim.
138. That offer effectively remained the same in May, 2003, as now limited to the two Plaintiffs and put at £122,000, supposedly as being 70% of the First Defendant's responsibility (which vis à vis the Plaintiff was of course misconceived.). By this time the relevant comparator was £311,000. This offer was even more inadequate and unreasonable if it was meant to be taken seriously.
139. However, the most interesting feature is this. By May, 2003, the First Defendant was in possession of all the relevant evidence relating to Miss Thompson's claim. Even with the benefit of all that information, the First Defendant does not seem to have changed his position at all. Which can only add weight to the suspicion, indeed I would put it higher, that the sums put forward by the First Defendant's insurers bore no resemblance to the value of Miss Thompson's claim but were rather statements of what funds would be made available or could be made available, or figures plucked out of the air.
140. What that irresistibly leads me to conclude is that it was a pure charade on the First Defendant's part to appear to be playing and to continue to be playing a serious role in the quantum proceedings. (For example he assumed responsibility for obtaining some of the medical evidence). His insurers were never going to, they did not, change their position. They were never going to make a serious assessment of the value of the First Plaintiff's claim set against all the medical evidence as it became available. In the case of the First Defendant, therefore, it is unnecessary to consider further the timing and amount of his offers set against the background of events as they unfurled.
141. Nor did the First Defendant's insurers at any stage introduce funds into the jurisdiction, whether by way of payment into Court or otherwise or as an earnest of good faith. Even on the 31st May, 2003 (at the end of the first week of the trial after Mrs. Clark had given evidence), Mr. Dawes was inviting the Defendants, in my view sensibly, to combine their separate offers. Nothing materialised. Whilst, rightly, I cannot be privy to any discussions which may or may not have taken place between the Defendants in this regard, nor do I have any other evidence, I believe I am entitled to infer, based on my assessment of the more sensible attitude to monetary matters displayed by the Second Defendant's insurer's throughout (they had at least deposited £300,000 with the Court though not

strictly a payment in), that the failure of the Defendants together to take what would have been a reasonable course must be attributed primarily to the First Defendant (though I stress that this is a negligible factor in my conclusions).

142. Moreover, why the First Defendant should also become involved in the proceedings relating to the Second Defendant's limitation fund – involving the costs and interest elements – when he had neither constituted nor tried to constitute a fund is another mystery. Admittedly, the resolution of that issue equally impacted on the total Convention liability of any Defendant, regardless of whether he constituted a fund or not, but it was academic as far as the First Defendant was concerned if all that his insurers would or could make available was £120,000 or thereabouts.
143. As in the case on liability, so in the case on quantum I would describe the conduct of the First Defendant as perverse if I needed to do so. I do not. I conclude that it was unreasonable for the purposes of Rule 48(4)(b) to conduct his defence of Mrs. Clark's claim as he did, and award the First Plaintiff full indemnity costs against him for this part of the proceedings. My criticisms of the First Defendant apply equally to Mr. Le Noury's claim. I would just further note that the First Defendant never made any realistic offer (nor one which could be treated with any seriousness) as far as Mr. Le Noury was concerned, and of course never made any payment into Court. Accordingly full indemnity costs are also awarded to the Second Plaintiff.
144. I turn to this aspect of the First Plaintiff's costs claim against the Second Defendant. There are three matters to consider. The timing of the offers, their amounts, and the question of payment into Court. Unlike the position of the First Defendant, I must place the offers which he did eventually make against the appropriate factual background, which of course is what happened or did not happen between early August, 2001, and May, 2003. I have already reviewed that period in sufficient detail. I do not propose to do so again. The salient features I consider to be as follows.
145. The fact that the trial could not take place, as originally envisaged, in September, 2002, must be attributed to the First Plaintiff. Mr. Dawes took an unrealistically optimistic view of the speed with which he could obtain the necessary medical evidence, and for it thereafter to be sensibly assessed so as to proceed methodically but expeditiously to trial. Indeed, I could be unkind and say that there was a distinct lack of energy in pursuing quantum until the spring of 2002. The dates when all the medical reports were obtained during the course of the summer of 2002, and the dates when the consultations took place prior to those reports, can only indicate that they were requested in March/April 2002, at the earliest. It is also clear, I think, that the First Plaintiff did not address the potential significance of the neuropsychological aspects of her case as early she might have done (Dr. Leng's report did not become available until October, 2002). That aspect was to form an important part of the First Plaintiff's final quantification of her claim, and was to be the subject, rightly, of the main medical evidential argument at trial. To criticise the Defendants for failing to make constructive

offers to settle soon after February, 2002, is in my opinion unfair and misconceived. The First Plaintiff knew full well that she still had to obtain all the medical evidence to quantify her claim constructively; and in my view it was perfectly reasonable and proper for the Second Defendant to await all that evidence before starting to assess seriously the worth of the claim. After all, his insurers were going to foot the whole bill.

146. I had the feeling at times that Mr. Dawes believed too much that Mrs. Clark's claim would be settled satisfactorily because it was so irresistibly well-founded; an attitude perhaps exacerbated by what appeared, sometimes, to be an over-meticulous approach by Mr. Ferbrache.
147. In all the circumstances I conclude that it was reasonable on the part of the Second Defendant not to start making offers until just before the trial. Indeed, I would add this; with the Court clearly intending, if at all possible, to stick by the trial dates fixed for May/June 2003, the mounting pressure on the Second Defendant was considerable.
148. It would, in fact, have been considerably to the Second Defendant's financial advantage to constitute a limitation fund at an early stage, say in 1998 (when it would have amounted to about £240,000). Equally, it might have been beneficial to settle for the full sum claimed in early 2002. Neither failure prejudiced the First Plaintiff, nor can be considered unreasonable.
149. (One criticism, in passing, which I think can rightly be made of the Second Defendant (and the First Defendant for that matter) in this period was the continuous insistence that the First Plaintiff made further discovery of her GP's records. Defence Counsel have not made it clear to me what they were particularly seeking to obtain from those records, other than for the general purpose for providing their experts with "everything". I consider that that was unnecessarily obtrusive. It would have been helpful if Counsel for the Defendants had identified the issues upon which they were particularly seeking any relevant evidence. In the event the only matter at trial that was explored at all was the question of causation with regard to Mrs. Clark's back injury; and even that line of questioning soon disappeared into the sand).
150. I turn therefore to consider the question of the reasonableness or otherwise of the offers which the Second Defendant eventually made, from £185,000, inclusive of interest with costs being left for future determination, to £200,000 to £220,000, both on the same basis, on the 23rd, 24th and 30th May, 2003, respectively, the last being after Mrs. Clark had given entirely credible and comprehensive evidence (in my assessment). Additionally, the First Plaintiff had offered to settle for £250,000, plus costs and disbursements (26th May, 2003).
151. Mr. Ferbrache has honestly accepted that the Second Defendant's monetary assessment of the First Plaintiff's claim fell well short of that which the Jurats awarded in due course. With the benefit of

hindsight those offers are, in my view, clearly inadequate, but they have to be assessed when they were made. Were they unreasonable at the time?

152. I turn to the last and highest offer first. Mr. Dawes inferred that there was something sinister about that sum, in that soon after the quantum trial was completed the Second Defendant sought to reconstitute his limitation fund in virtually that same amount (the interest element being deleted from the overall figure), thus seeking some protection for the Second Defendant on the issue of costs. I ignore any such allegation. However, whilst it might be said that any offer is better late than never, one of the main credits which can attach to a sensible offer being made timeously is that it may well avoid the necessity for a victim in a personal injuries case having to give evidence, often a desirable objective. This offer, of course, was made after Mrs. Clark's evidence had been given. In those circumstances, I certainly consider it to have been low.
153. Obviously, as the Second Defendant did not settle for £250,000 (the First Plaintiff's figure put forward on the 20th May but withdrawn on the 2nd June, 2003), that sum must have been excessive in his insurer's assessment. The assessments of both £185,000 and £200,000 were also, in my opinion, low. There was certainly some English authority for the stance adopted by the Second Defendant in respect of pain, suffering and loss of amenity, which he assessed at only just over half that being claimed. Loss of earnings both past and, particularly, future, were difficult areas for assessment. Even though in my view an adequate offer should have been closer to the figure put forward by the First Plaintiff than either of the offers made pre-trial by the Second Defendant (if the position as to costs was also satisfactorily addressed), I cannot say that even the amount of £185,000 was one which crosses the borderline between inadequacy and unreasonableness.
154. The further element, as indicated, is that of costs. That matter must always be one upon which a plaintiff is entitled to be reasonably satisfied if he or she is going to accept an offer. In this case, there appears to have been a lack of clarity, even of distrust, relating to costs (as to other things), as evidenced by the hectic exchange of e-mails at the time. Lurking in the background is the shadow of the Convention. It had been argued by Mr. Ferbrache, in the summer of 2002, that costs were to come out of the limitation fund and would not be an additional expense for the Second Defendant. It might be all very well, therefore, to say in May, 2003, that both the bases and amounts of costs were to be subsequently assessed by the Court if necessary, but of course if they were to come out of the Second Defendant's limitation fund their formal determination would be a wholly academic exercise. It was that very issue which was raised by the Second Defendant after the conclusion of the quantum trial and had to be resolved by Miss Newman L.B (in the Plaintiffs' favour with costs on the standard recoverable basis).
155. Apart from the question of distrust between Counsel, I consider that one of the important factors impacting upon the negotiations taking place in the days, almost hours, before the start of the trial,

was the pressure of time. I appreciate that it is often in the very nature of litigation for negotiations to take place just as (and often because) the doors of the Court are about to open, but the fact that these negotiations were taking place at such a late stage I certainly cannot attribute, in line with my earlier analysis of events, to the Second Defendant to any significant degree, if at all.

156. Finally, I must deal with the question of payment into Court in relation to the Second Defendant, and I turn firstly to the law.

157. Rule 45 relates to payments into Court. The first five subsections encompass the mechanics of payments and a general prohibition on their disclosure until all questions of liability and quantum have been determined. Sub-section (6) provides:-

“Without prejudice to the Court’s complete discretion as to make such order as to costs it thinks just, the Court, when awarding costs, may take the fact and date of payment into Court into account.”

158. Whilst subsection (6) may be designed primarily as a protection to defendants on the matter of costs, the opposite must be equally true. Nevertheless, it was argued (by Mr. Merrien in fact) that these provisions relate solely to the question of awarding standard recoverable costs and did not extend to the question of whether it was right in principle to award indemnity costs. I do not agree. Although the English authorities of Cutts and Singh, to which Mr. Dawes referred me, are based on the far more extensive statutory provisions in England in Wales, provided by the Rules of the Supreme Court and their successors, and related to “*Calderbank*” and similar offers, they provide helpful authority for the proposition, which I gratefully adopt, that in simple money claims “*a defendant who wishes to avail himself of the protection afforded by an offer must, in the ordinary way, back his offer with cash by making a payment in and....*”. (See Oliver L.J. in Cutts at p. 610 d). Carey D.B. in Le Moigne held in the circumstances of that case that a seriously inadequate payment into Court was a special circumstance for the purposes of Rule 48(4)(a). So much the more so, in my view, it may be appropriate to take into account a total failure to make any payment into Court, either as a factor in itself or placed in the context of the adequacy of any offers made.

159. It was accepted that the establishment of a Convention limitation fund by the Second Defendant, even by lodging the £300,000 with the Court, was not a payment into Court in the generally accepted sense. However, the Second Defendant’s insurers had at least voluntarily shown the colour of their money; the purpose of constituting a full fund – to obtain release of an income-earning vessel – did not arise in this case. Additionally, they are a respected insurance company resident in the jurisdiction. I consider the constitution of the fund, in stark contrast to the position of the First Defendant’s insurers, is something which weighs in the Second Defendant’s favour.

160. There are many factors, some unsatisfactory, which I have to balance. In all the circumstances, the First Plaintiff has not persuaded me, the normal civil burden being on her, that the Second Defendant should be condemned in indemnity costs, of any kind, for the second part of these proceedings. The costs, therefore, will be on the standard recoverable basis for the quantum proceedings, as defined.
161. With one exception. I do not consider that the Second Defendant had any justification in seeking to dispute the appropriate rate of interest to be applied to the basic element of its limitation fund. The logic of, and bases for, H.M. Comptroller's advice which he had given well over two weeks before the hearing was in my respectful view irrefutable. To continue the challenge, therefore, was in my view unreasonable, so as to condemn the Second Defendant in full indemnity costs for this limited part of the quantum proceedings.
162. I now turn to the position of the Second Plaintiff vis à vis the Second Defendant regarding the costs of the quantum proceedings. My lack of reference, to date, to the position of the Second Plaintiff in this regard, though deliberate, is, I believe, a fair reflection of the attention which was given to his position by Counsel (it is more than understandable that the position of the First Plaintiff was of very much greater concern).
163. The facts with regard to the Second Plaintiff are that in his original Cause he claimed £28,900, being £20,000 for pain, suffering and loss of amenity, £5,400 for loss of earnings and £3,500 for future handicap on the labour market. By December, 2002, when his up-to-date schedule of damages was completed and forwarded to the other parties (which remained the schedule up to and during the trial) his claim had been amended as follows:- £14,250 for pain suffering and loss of amenity, £3,118.42 for past loss of earnings, three minor items of miscellaneous expenditure, £2,500 for future loss of earnings and £1,000 for future medical expenses, making a total of £21,308.53.
164. I turn to the question of offers. On the 26th of May, 2003, Advocate Dawes indicated to the Defendants' Counsel that the "bottom line" as far as Mr. Le Noury was concerned was £17,500, together with costs and disbursements. Mr. Dawes had indicated before that date the amount of costs which Mr. Le Noury had already incurred, which in all amounted to approaching £75,000. On the 30th May, by which date all the evidence regarding Mr. Le Noury, that is his own (with disarming conviction, in my view) and that of his surgeon, had been given to Court, Advocate Ferbrache indicated an offer of £16,000, which excluded costs. There followed in the first week or so of June further exchanges between Counsel from which it is clear that the actual amount of Mr. Le Noury's claim was not really in issue but the continuing discussions revolved around costs (as they had in the case of Mrs. Clark). Subsequently, but prior to the conclusion of the trial, the Court was informed that Mr. Le Noury's claim had been settled in the sum of £16,000, with costs to be assessed.
165. One can only have the greatest sympathy for Mr. Le Noury. His claim has always been realistically and reasonably assessed, and he has clearly made light of his injuries and their consequences. For

understandable reasons, Mr. Le Noury has been overshadowed in these proceedings throughout. It has to be acknowledged that the amount at which he agreed to settle is that which the Second Defendant himself offered, being lower than the amount actually claimed by Mr. Le Noury and that which was his “bottom line” in the words of his Advocate (£17,500). On the other hand, I feel confident, to the extent of virtual certainty, that if the Jurats had had to determine the amount of damages which should be awarded to him, then the figure they would have arrived at would have been the amount claimed or very close to it.

166. The Second Defendant made no offer to settle the Second Plaintiff’s claim before all his evidence had been given. A realistic offer should certainly have been made by the Second Defendant reasonably soon after the production of the final schedule of damages in December, 2002. Mr. Le Noury was a wholly innocent party; his case was simple, modest and clear cut; it should never have proceeded to trial. There was nothing to argue about; there was nothing to inquire into. It should have been settled long since. Whilst Mr. Dawes was not without blame in the matter, I feel strongly that the Second Defendant had more than ample opportunity to make realistic offers well before the trial was scheduled to start, and to reach a satisfactory conclusion. Even at the late hour of the 26th May, 2003, Mr. Le Noury’s “bottom line” of £17,500 should have been accepted.

167. In all the circumstances to defend Mr. Le Noury’s claim was unreasonable, so as to justify the award of costs, otherwise than on the normal recoverable basis, namely on a full indemnity basis.

(c) Second Defendant’s Claim v. First Defendant

168. Finally I turn to the separate matter of the Second Defendant’s claim in costs against the First Defendant. When the matter came up for argument, Mr. Merrien no longer had instructions. With regard to the liability proceedings (paragraph 2 of his application), the Second Defendant shall have his costs on the standard recoverable basis, save as follows. There will be exempted from the generality of this order those costs associated with the question as to whether the Hull or personal injuries actions should proceed first; on this matter the First Defendant shall be entitled to standard recoverable costs against the Second Defendant, so as to be set-off or deducted from the Second Defendant’s general claim against him. So also any costs relating directly and solely to the adjournment of the trial in May, 2001, shall be similarly payable and deductible. Thus, for example, the costs of Captain Spencer’s report would not itself be exempted because it was relevant in preparation for the trial whenever it was held.

169. The First Defendant is to pay to the Second Defendant 70% of the Plaintiff’s costs awarded against the latter in the quantum proceedings (paragraph 3 of the application).

Summary of decisions

170. I summarise my decisions.

- (i) The First Defendant shall pay to both Plaintiffs their costs of and relating to the liability proceedings on a standard recoverable basis until 31st December, 2000, and thereafter on a full indemnity basis, save that the First Defendant shall not be liable for any costs which relate to the question of whether the Hull or personal injury actions should proceed first, and that the First Defendant's liability to costs in respect of the question as to whether his conviction was admissible in evidence will be on the standard recoverable basis.
- (ii) The First Defendant shall pay to both Plaintiffs their costs of and relating to the quantum proceedings on a full indemnity basis.
- (iii) The Second Defendant shall pay to the Plaintiffs their costs of and relating to the liability proceedings on the standard recoverable basis until the 3rd May, 2001, inclusive, and thereafter on a partial indemnity basis (if such it be), namely the hourly rate for Advocate's fees is set at £220. Exempt from this order shall be any costs relating to the question of whether the First Defendant's conviction was admissible in evidence.
- (iv) The Second Defendant shall pay to the First Plaintiff her costs of and relating to the quantum proceedings on the standard recoverable basis, save those attributable to determining the question as to what rate of interest was applicable to the Second Defendant's limitation fund, which costs will be on a full indemnity basis.
- (v) The Second Defendant shall to pay to the Second Plaintiff his costs of and relating to the quantum proceedings on a full indemnity basis.
- (vi) For the avoidance of any doubt, all orders of Miss Newman LB with regard to costs stand.
- (vii) The First Defendant will pay to the Second Defendant his costs of the liability proceedings, save that the First Defendant may deduct from that amount, firstly, his costs in relation to the question as to which trial was to proceed first, and secondly any costs incurred directly arising from the adjournment of the trial in May, 2001.
- (viii) The First Defendant will pay to the Second Defendant 70% of the costs awarded against the Second Defendant in favour of the Plaintiffs in relation to the trial on quantum.
- (ix) Costs to be taxed if not agreed.

171. I will hear submissions as to the costs of these proceedings.

Postscript: expert evidence

172. A recurring feature in this case has been the potential problems which may arise with regard to the evidence of experts in the context of a trial before Jurats. I thought it might be useful to remind Counsel of various matters relating to such evidence and, where appropriate, how they might or should be approached.
- (i) Those who can be treated as experts may be witnesses both as to fact and/or opinion; for example, as regards the former the details of an operation carried out by a surgeon; and as regards the latter, his opinion as to the severity of injuries suffered, or prognosis.
 - (ii) Evidence of opinion cannot be relevant, and therefore admissible, until the basis for it is laid, either by accepted or established fact or facts assumed for the purpose.
 - (iii) From which may flow various consequences.
 - a. Where relevant opinion can only be based on facts to be established at trial, those whose opinions are to be adduced must attend whilst that factual evidence is given. Thus they will opine on the basis of the facts which they accept, though in the event the Jurats may reach different factual conclusions. A trial relating to liability for an accident at sea is an example, as in this case.
 - b. Opinion based on facts established pre-trial must state those facts. For example, the evidence of a psychologist may need to include both the tests which he carried out on a patient, and their results, before offering his conclusions as to prognosis.
 - (iv) It must always be expected that experts will give their evidence orally. The purpose of requiring parties to provide or exchange their expert evidence in advance of trial is to help the parties, and presiding judge, to identify the essential issues, and to help the parties to consider, when appropriate, how the case might be settled. Such a report may, in due course, become an agreed statement and therefore admitted in that form.
 - (v) When an expert does give oral evidence, his pre-trial report has the status of a previous (witness) statement, or indeed effectively in some cases as his notebook with conclusions. In such way, it may come to be referred to by the witness in chief, (so that his evidence does not amount to a memory test) or cross-examination (credibility and/or accuracy), or re-examination (though there must be no leading in re-examination, it will usually be right that any part of a pre-trial report which has come out in cross-examination should be placed in its proper context when it is desirable or necessary to do so).

- (vi) In no circumstances will experts' reports which have not been agreed form part of the Jurats' pre-trial bundle, (nor will any witness statement which does not form an agreed statement). Even if the expert report (or witness statement) is agreed in full, it may only form part of the Jurats' bundle with leave of the presiding judge.
- (vii) In the ordinary course, it will be expected that a plaintiff will complete his case, including adducing the evidence of any expert he may call, before the defendant starts his. However, because in practice experts (certainly on medical matters) are likely to be called from England (and thus not compellable), it may become necessary and/or desirable (when no other convenient dates are available to them) to call them out of the normal order; sometimes, indeed, so that experts in a particular expertise are "paired" or heard "back to back". Depending on the circumstances, it may be necessary for defence Counsel to open sufficiently to make the purpose of adducing that evidence clear to the Jurats before they hear it.
- (viii) It is important that Counsel properly identify the nature and extent of the issues for which expert evidence may be required.

For example, where a dominant issue with regard to quantum is the extent and consequences of a head injury, it can hardly be relevant to require exhaustive discovery of prior GP records which could never relate to that matter. If there are issues, for example back problems, for which earlier medical evidence is or may be relevant, they should be identified. That relevant, and even possibly relevant evidence, can then and must be disclosed. Counsel, however, must guard against uninhibited trawls through all of a victim's medical records which could be an unwarranted intrusion into that person's privacy.

Counsel should also remember that the purpose of adducing evidence from those who are experts is so that they may assist the Court, by explanation and interpretation, to understand matters which in the normal course are outside the knowledge of ordinary people. At the end of the day it is the Court which has to reach the ultimate opinion on any particular issue, not merely rubber stamp that given by an expert. Thus Counsel should also guard against obtaining and introducing evidence from those who may well have expertise, or some expertise, but whose assistance would offer no practical assistance to the Jurats in their determination of the factual issues in the particular case, e.g. the causes of a road traffic accident or future employment prospects.

- (ix) In no way are these comments to be regarded as comprehensive (for example, I have not referred to Rule 43); they are specifically limited to those matters which this case has highlighted. The potential problems which may arise with regard to expert evidence are numerous, and new ones will have to be addressed as they arise. It is hoped, merely, that the

general thrust of these observations may provide some guidance. Counsel will find the judgment of Talbot LB in Webber v. Allied Dunbar Assurance (16/08/2001) to be of assistance.