

JERSEY / JUDGMENT

Saint -v- Le Feuvre [2014]

JRC 142D (15 July 2014)

[2014] JRC 142D

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judgment

the commissisoner:

Introduction

1. On 7 th April, 2011, at about 5pm, an accident occurred at the junction between La Route des St Jean ("the B27") and La Rue des Bilières in the parish of St Lawrence ("the junction"), when a motor cycle ridden by the Plaintiff ("Mr Saint") collided with a Transit van driven by the Defendant ("Mr Le Feuvre"). As a result of the collision Mr Saint sustained injuries, in particular a fracture of his right ankle. It was Mr Saint's case that the accident was mainly caused by Mr Le Feuvre's negligence in suddenly, and without warning, turning right into his path as he was overtaking Mr Le Feuvre. Conversely it was Mr Le Feuvre's contention that the fault lay entirely with Mr Saint in trying to overtake him as he was properly turning right into La Rue des Bilières. Mr Saint claimed damages in the sum of £130,576.40 as detailed in his Schedule of Loss (as amended), exclusive of interest. Mr Le Feuvre made no counterclaim. 2. Mr Saint was represented by Advocate Nicholls of Walkers; Mr Le Feuvre was represented by Advocate Hall of Viberts. The hearing took place over three days and, following closing submissions, the Court reserved its judgment. The issues 3. Mr Le Feuvre disputed both liability and the quantum of the damages claimed by Mr Saint. (A) Liability 4. Not surprisingly, the parties were agreed on the basic legal principles applicable to issues of liability. 5. In *Morley v Reed*

[2012] JRC 127A , Commissioner Clyde-Smith summarised the relevant law as follows:- "33. As made clear in *Rudd (née Lowry)-v-Hudson*

[1977] JJ 2055 at 2062, the essential ingredients of actionable negligence are:- (i) The existence of a duty to take care owing to the plaintiff by the defendant; (ii) Failure to attain that standard of care prescribed by the law; (iii) Damage suffered by the plaintiff which is causally connected with the breach of duty to take care. 34. As further made clear in *Rudd* , the driver of a motor vehicle owes a duty to exercise reasonable care and skill towards all persons using the highway and therefore both the plaintiff and the defendant owed to each other a duty of care. The relevant standard of care is set out in *Goad-v-*

Butcher and another

[2011] EWCA Civ 158 at paragraph 10:- "to take reasonable care to avoid causing injury to other road users whom he should reasonably have foreseen might be affected by his actions. That means he had a duty to act as a reasonably prudent and careful driver...." This is not a counsel of perfection as the court in the same case observed at paragraph 11:- "a driver will not be held negligent simply for failing to achieve that." 35. The question which must be asked and answered is whether the defendant's decision ... was negligent at the time he took it in the light of the position he was in, and what he knew or ought to have known at that moment (Lambert-v-Clayton

[2009] EWCA Civ 237 at paragraph

30) 37. Turning to contributory negligence, Article 4(1) of the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960 provides as follows:- "Where any person suffers damage as the result partly of the person's own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage." 38. Fault is defined by Article 4(9) to mean any:- "wrongful act (faute), negligence (négligence) lack of skill (impéritie), breach of statutory duty or other act or omission which gives rise to liability in damages or would, apart from this Article, give rise to the defence of contributory negligence." 39. These provisions enable the Court to reduce the damages in proportion to the degree of responsibility for the accident; and the Court may take into account not only the share of each party in causing the accident, but also the degree of blameworthiness (see Louis-v-Troy and others

(1970) JJ 1371 at 1404). 40. In Hacquoil-v-Troy & Sons and Harbours and Airport Committee

(1970) JJ 1305 , the Court referred (at 1333-1334) to Halsbury's Laws of England (Third Edition) to define the test to be applied:- "the test to be applied is whether the defendant's negligence was nevertheless a direct and effective cause of the misfortune. The existence of contributory negligence does not depend on any duty owed by the injured party sued and all that is necessary to establish a plea of contributory negligence is to prove that the injured party did not in his own interest take reasonable care of himself and contributed by this want of care to his own injury. The standard of care depends upon foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonably prudent man, he might hurt himself." 41. In Jones-v-Livox Quarries

[1952] 2 QB 608 it was established that contributory negligence does not require a plaintiff to reasonably foresee the particular risk to which he succumbs but only that a plaintiff should foresee the general risk. 42. The Court of Appeal in Jersey Post-v-Chartier

[2007] JLR 187 at 196 held that:- "It is obviously logically impossible for the court making the deduction to do so with mathematical precision. In truth, it is really a matter of impression, the court looking at the conduct of the claimant and of the other person or persons and doing the best it can to be fair. The phrase "just and equitable" is suggestive of a discretion" 6. We adopt that summary. In reality, however, the outcome of the present case turns on our factual findings, the fundamental questions being which of Mr Saint and Mr Le Feuvre was responsible for the accident and, if they were both responsible, in what proportions. The facts in more detail 7. In April 2011 both Mr Saint and Mr Le Feuvre were working for the same employer, Drain It Limited. They were on friendly terms. Mr Saint was an experienced motor cyclist and Mr Le Feuvre was an experienced driver. Drain It's premises lie just off the B27, some 277 metres north of the junction. On the afternoon of 7 th April, 2011, which was a clear, sunny and dry spring day, both men left the company's premises at about the same time. Mr Le Feuvre, who was ahead, was in his white Transit van registration number J1081240; the van had no windows in the rear doors but had external mirrors on each side, including blind spot mirrors. He was followed by Mr Saint who was riding his silver CCM R30 Supermoto motorcycle, registration number J16242. Both men made their way down the dusty access track to the B27, where they turned left onto the B27. 8. The B27 is situated in a rural area of the parish of St Lawrence. It runs in a general north/south direction between Le Chemin de Herupe (the B50) and La Route de St Aubin (the A1). The road is subject to a 40 miles per hour speed limit; it is bordered on both sides by raised grass embankments and farmland, with a number of minor junctions. There are no footpaths along the road and no centre white line to separate oncoming traffic. Throughout its length the B27 is fairly narrow and twisty; from the premises of Drain It to the junction, the road is approximately 4.4 metres wide. 9. Approaching the junction from the north, there is a long sweeping left hand bend, after which the road straightens up some 60 metres from the junction. About 20 metres short of the junction the road starts to widen, so that the effective road width at the junction itself is 5.9 metres (measured to the give way line at the entrance to La Rue des Bilières). For traffic travelling south, La Rue des Bilières meets the B27 as, effectively, a Y junction. South of the junction the B27 narrows again to fairly constant width of 5.4 metres. It took Mr Le Feuvre and Mr Saint about 25 seconds to cover the short distance from the track to the junction. They were both driving at between 25 and 30 miles per hour. There is therefore no suggestion that either man was driving at an excessive speed, nor is there any suggestion that speed played any part in the accident. 10. Turning to the accident itself, Mr Saint's version of events as set out in his first witness statement was as follows:- "6. [Mr Le Feuvre] slowed down his van and pulled it in to the left hand side of the road. I could not gauge why he was stopping. There was no indication at all. I thought to myself he was maybe pulling over to take a telephone call. It didn't make sense why he was slowing down. 7. The van had filled in rear doors so I could not see through it, so I positioned myself at the crown of the road so that I could see directly ahead of [Mr Le Feuvre], and that had he been looking in his wing mirror he could see me. I was conscious that I wanted [Mr Le Feuvre] to be aware that I was behind him. The road

ahead was entirely clear, albeit there were two parked cars to the right hand side of the road, just beyond a small turning to the right to a minor road. I could see all the way to the bend in the road some 450 feet ahead. 8. I confirm that no signal was visible from the rear of [Mr Le Feuvre's] vehicle. 9. I confirm that I did not see any oncoming vehicle whatsoever, either approaching, slowing, stopping or flashing. I also checked for any vehicle approaching behind me by physically turning my head to look behind me. The road ahead was also clear and therefore I commenced an overtaking manoeuvre. If there had been any oncoming vehicles I would not have started to overtake. 10. I confirm that I had already commenced the overtaking manoeuvre and was already beside [Mr Le Feuvre's] van when it suddenly, sharply turned right. As I was beside the van, I had a clear view of the road ahead and confirm there was still no oncoming traffic. 11. As [Mr Le Feuvre] turned there was no opportunity for me to skid or take any avoiding action. Both my bike and body instantly connected with the van causing bruising to my left hip and soft tissue damage to the little finger of my left hand which had been holding the handlebar grip. The collision then pushed my bike to the ground, tipping it over to the right, trapping and causing injury to my right leg beneath it." We record at this point that it was never suggested to Mr Le Feuvre in cross-examination that he was in fact taking a telephone call at the relevant time. 11. Mr Le Feuvre's account of the accident was equally succinct, but very different. His witness statement read as follows:- "3. As I drove along La Route des St Jean I was driving within the speed limit at roughly 25 mph. As I approached my usual turn off, I signalled to turn right into La Rue des [Bilières] but also slowed down significantly because I saw a vehicle coming in the opposite direction and overtaking parked cars. I am afraid I cannot remember what kind of car this was other than it was a black car. This car signalled for me to go. I believe I then checked my side mirror (as my car does not have a back window so it is the only mirror that I can check), and I started to turn across the road. 4. I believe I was just about to enter into Les [Bilières] when I suddenly heard a motorcycle which sounded like it was skidding. I must have quickly turned my head right and I saw a motorcycle very close to the side of my van and I could see he was struggling to stop. It all happened very quickly, a matter of seconds, but I believe I instinctively attempted to swerve to the left to try and give him some room to avoid hitting me but the driver was already coming off the bike. He hit the front driver's door with the bike handle and fell off his bike onto the floor. I do not know how fast Mr Saint was going but it was fast enough for me not to see him when I looked in the mirror but when I had already entered the beginning of Les [Bilières], I immediately heard him and then saw him." 12. After the accident Mr Saint was assisted by a resident from a nearby property who gave him a glass of water and helped him to his feet, although he was unable to bear any weight on his right foot. Mr Le Feuvre rode Mr Saint's motorcycle back to Drain It's premises and got a lift back to the scene of the accident with a Mr Hutchison. Mr Le Feuvre then drove Mr Saint to hospital in his van. The evidence 13. Both sides called both factual and expert evidence. The factual witnesses called by Mr Saint comprised (in the order in which they gave evidence) Mr Barry Hutchinson, Mr Saint himself and Mr Martin Roberts. We record for the sake of completeness that Advocate

Nicholls applied on the first day of the trial for leave in accordance with Article 4 of the Civil Evidence (Jersey) Law 2003 to adduce the evidence of Mr Carl Burrell as hearsay. The Court declined Advocate Nicholls' application for the reasons which we gave in a ruling of the same day, whereupon Advocate Nicholls elected not to call Mr Burrell. Mr Le Feuvre gave evidence and called his wife, Mrs Clare Le Feuvre, as a witness. 14. Both sides called experts in collision investigation, Mr Irwin for Mr Saint and Mr Paine for Mr Le Feuvre. Preliminary matters 15. We deal at this stage with three matters, namely:- (i) that Mr Le Feuvre was driving while uninsured; (ii) that the police were not called; and (iii) the absence of any independent witnesses.

- (1) Mr Le Feuvre was driving while uninsured 16. Mr Le Feuvre admitted in his Answer that he was not insured to drive his van on 7 th April. In their statements both Mr Le Feuvre and his wife asserted that the reason why he was uninsured was that they had failed to renew the insurance on the van. Mrs Le Feuvre sought to maintain this explanation in her oral evidence, which she gave before that of her husband. In reality the position was very different, as Mr Le Feuvre accepted in due course in his cross-examination. What in fact happened was that the relevant policy with Royal and Sun Alliance Insurance had been renewed in the name of Mr Le Feuvre's company (GLF Vehicle Repairs Limited trading as Saint Laurent Garage) on 22 nd March, 2011, for a period of 12 months, but the standing order in the insurance company's favour for the payment of the premium by monthly instalments was not honoured because Mr Le Feuvre's company was in financial difficulties. This led to the insurance company cancelling the policy with effect from 6 th April, 2011. 17. We were unimpressed by this attempt on the part of both Mr Le Feuvre and his wife to espouse what, we suspect, they regarded as a less blameworthy explanation for Mr Le Feuvre driving uninsured on the day in question. We also reject Advocate Hall's submission that there was no real difference in the minds of Mr and Mrs Le Feuvre between the two versions of events. The failure by the client to renew an insurance policy is quite different from the cancellation of an insurance policy by the insurer for non-payment of the premium, as both Mr and Mrs Le Feuvre, in our judgment, fully appreciated. 18. That said, we do accept the evidence of Mr and Mrs Le Feuvre that they did not know on 7 th April, 2011, that Mr Le Feuvre was not insured to drive his van. We find that it was not until a week or so later, when Mr Saint suggested to Mr Le Feuvre that the accident had been Mr Le Feuvre's fault, that Mr Le Feuvre discovered that he was not insured, whereupon he took out a new 12 month insurance policy with effect from 15 th April, 2011, in respect of his Shogun motor car. (He did not insure himself in respect of the van because that vehicle was no longer being used on the public highway.) It follows that we reject any suggestion that the actions taken by Mr Le Feuvre immediately after the accident were motivated by a desire on his part to prevent the police from discovering that he had been driving whilst uninsured.
- (2) The police were not called 19. Article 52 of the Road Traffic (Jersey) Law , entitled "Duty of driver of vehicle in case of accident", provides as follows:- "(1) Where, owing to the presence of a vehicle on a road, an accident occurs whereby damage or injury is caused to any person ... or property, real or personal, the driver of the vehicle shall stop and B (a) (iii) if

injury is caused to any person ..., shall immediately inform a police officer of the occurrence of the accident and shall not move the vehicle without the consent of a police officer" This obligation is repeated at Annexe 4 to the Jersey Highway Code. Neither Mr Saint nor Mr Le Feuvre complied with this obligation notwithstanding that each of them had with him, as we find, a mobile telephone. Although both of them were no doubt shaken by their involvement in the accident, neither man had, in our view, any valid excuse for not informing the police as required by Article 52. 20. Each party sought to blame the other for this failure. We have already rejected Advocate Nicholls' contention that Mr Le Feuvre did not call the police because he was concerned about his lack of insurance. It was Mr Le Feuvre's evidence that after the accident Mr Saint had asked him not to call the police because he (Mr Saint) had an illegal front tyre. Mr Saint refuted this suggestion and the evidence of Mr Roberts (which Advocate Hall did not seriously challenge) established that the front tyre of Mr Saint's motorcycle was in fact acceptable. It is unnecessary for us to adjudicate on this conflict of evidence between the parties for the simple reason that in our view it does not matter why the police were not called to the scene. The fact is that they were not called, so that both parties (and their experts) have been deprived of whatever assistance the police might have been able to afford in terms of forensic evidence. One consequence of this absence of forensic evidence is that the collision investigation experts were, through no fault of theirs, limited in the assistance which they could offer to the Court.

- (3) The absence of any independent witnesses 21. Neither party was in a position to call any independent witness to the accident. Again each party blamed the other for this state of affairs. Mr Saint complained that because it was not until a week or so after the accident that Mr Le Feuvre suggested for the first time that the accident was his (Mr Saint's) fault, he was deprived of the opportunity of tracing the resident who came to his assistance after the accident. Conversely Mr Le Feuvre complained that because it took Mr Saint some ten months to issue his Order of Justice, he was deprived of the opportunity of tracing the driver of the black car. 22. It is not obvious to us that the resident who came to Mr Saint's assistance would have been able to say anything about the accident. The driver of the black car (assuming that he existed, as we find later in this judgment that he did) would have been able to confirm his presence at the junction at the relevant time but he too would probably not have been able to see the accident itself since the motorcycle would have been hidden from his view by the van. Be all that as it may, again the simple answer is that this point avails neither side; each party was left to rely on his own evidence. Discussion and conclusions 23. We start with the position of Mr Saint, not least because in his final address Advocate Nicholls conceded that his client was partially at fault for the accident by overtaking Mr Le Feuvre at the junction. In our judgment this concession was, on the evidence presented to us, inevitable. 24. The Jersey Highway Code provides that:- "A failure on the part of a person to observe any provision of The Jersey Highway Code ... may in any proceedings be relied upon by any party to the proceedings as tending to establish or negative any liability which is in question in those proceedings." Rule 167 of the Highway Code (as applicable in Jersey) provides as follows:- "DO NOT overtake where you might come

into conflict with other road users. For example approaching or at a road junction on either side of the road where traffic is queuing at junctions or road works when a road user is indicating right, even if you believe the signal should have been cancelled. Do not take a risk; wait for the signal to be cancelled." It is clear that on his own admission Mr Saint was in breach of Rule 167; he was overtaking Mr Le Feuvre at a junction and, for good measure, when Mr Le Feuvre could be said to be queuing at the junction. He was also overtaking when, as we find for reasons set out later in this judgment, the van was indicating to turn right. In our view, however, the fault of Mr Saint went beyond the mere fact that he was overtaking Mr Le Feuvre at the junction. 25. First, Mr Saint was, again on his own evidence, riding his motor cycle what he described as two to three car lengths behind Mr Le Feuvre's van "all the way" to the junction. At the speed of about 25 miles per hour at which both Mr Saint and Mr Le Feuvre were travelling, it was common ground between the experts that this distance was the equivalent of a one second gap, or half the generally recommended two second gap. In this position Mr Saint was, in our view, in breach of Rule 163, which reads:- "Overtake only when it is safe and legal to do so. You should not get too close to the vehicle you intend to overtake." In addition, this two to three length gap between Mr Saint and Mr Le Feuvre meant that if Mr Saint was riding immediately behind Mr Le Feuvre's van, he would have been in the blind spot (or more accurately, perhaps, the blind triangle) behind Mr Le Feuvre's van which the van's external mirrors did not cover. 26. Second, Mr Saint also admitted in para.6 of his witness statement (as quoted in para.10 above) that he did not know why the van was slowing down. In cross-examination he described the suggestion in his statement that Mr Le Feuvre might have been pulling over to take a telephone call as "speculation", adding for good measure that Mr Le Feuvre "could have been doing anything". He went on to say that he could not determine what the van was doing, though he also accepted that the van could possibly have been wanting to turn right. Finally, in answer to a question from the Court he added that it did not make sense to him for the van to be pulling over. It seems to us that just as Rule 167 prohibits overtaking when "a road user is indicating right, even if you believe the signal should have been cancelled", so also one should not overtake when a road user is (as Mr Saint asserted, albeit wrongly, was the case with Mr Le Feuvre) making no signal at all. In each case the warning "Do not take a risk" must apply. Finally, Rule 166 states:- "DO NOT overtake if there is any doubt." On any view Mr Saint was, on his own admission, not just in doubt about, but wholly uncertain as to, Mr Le Feuvre's intentions. In those circumstances he should not have been overtaking the van. As Mr Irwin accepted, the safest course for Mr Saint to have taken was simply to have waited. 27. Advocate Nicholls relied on three authorities in support of his submission that Mr Saint should be held to be no more than one third to blame for the accident. Those authorities were as follows. 28. In *Pell v Moseley*

[2003] All ER (D) 338, the case summary reads:- "The claimant had been riding his motorcycle along a single carriageway road. The defendant was driving a people carrier along the same road, and was the first in a line of three vehicles. The claimant overtook the rear two vehicles, but as he continued his overtaking manoeuvre past the defendant's vehicle, she

executed a right turn, in order to enter a field where a motocross event was taking place, and the claimant's and defendant's vehicles collided. The claimant suffered serious injuries and issued proceedings against the defendant for damages. The judge heard evidence from the claimant and defendant, and a number of witnesses. He accepted the claimant's evidence that the defendant had failed to give any indication that she was about to execute a right turn and found that the defendant had failed to keep a proper lookout. The judge further found that as the claimant had executed a reasonable and safe overtaking manoeuvre, no finding of contributory negligence would be made against the claimant. The defendant appealed against that decision on the ground, *inter alia*, that the judge had erred in failing to make a finding of contributory negligence. The defendant contended that the claimant, a local man, had had knowledge of the motocross event taking part [sic] in the adjacent field, and that in those circumstances, he ought not to have undertaken the overtaking manoeuvre where there was a possibility of vehicles making a right turn into the event. The appeal would be allowed. On the facts of the present case, there had been sufficient material before the judge in respect of the claimant's knowledge of the motocross event for there to have been a finding that the claimant should have realised the likelihood of a vehicle turning right at the point where he had executed his overtaking manoeuvre. In those circumstances, it would be appropriate to make a finding of contributory negligence on the part of the claimant and, as it was not possible to distinguish between the two parties in respect of their blameworthiness, both drivers had been equally to blame for what had happened. The claimant's contributory negligence would, accordingly, be assessed at 50%." Advocate Nicholls submitted that Mr Saint's manoeuvre had not been anything like as dangerous as that of the claimant in *Pell*. 29. In *Holdack v. Bullock Bros (Electrical) Ltd*.

- (1964) 108 Sol Jo 861; affirmed (1965) 109 Sol Jo 238, the summary at para.[10.4] of Bingham & Berryman's *Personal Injury and Motor Claims Cases* (12th ed.) reads:- "In daylight on a straight road a motor scooter was overtaking a van when it swerved to the offside resulting in the scooter colliding with the van's offside front wing. The van driver had not seen the scooter although he had two outside mirrors and an interior mirror. The judge held the van driver negligent for changing direction without warning when it was extremely dangerous, but held the scooter rider one-third to blame for failing to hoot so as to alert the van driver that he intended to overtake. The scooter rider appealed. HELD: There was no ground on which the Court of Appeal should interfere. In the ordinary way if a motor scooter was overtaking another vehicle which was going straight along a road there was no need for the scooter to hoot before overtaking if the scooter was giving reasonable clearance. In this case the judge must have come to the conclusion that the movement of the van was such as to put the scooter rider on enquiry as to what the van was going to do." 30. Finally in *Powell v Moody*

(1966) 110 Sol. Jo. 215 the summary at para.[10.7] of Bingham & Berryman reads:- "Riding his motorcycle along a busy road, the claimant came up to the tail of a stationary line of traffic consisting of vehicles two abreast. The claimant proceeded along the line of traffic, overtaking the stationary vehicles. The defendant, driving a car, came out of a side road on the nearside of the line of traffic to pass through a gap and turn right to go along the main road in the opposite direction. He was given a signal by the driver of a milk tanker to come out and as he was inching his way out the claimant, who had not seen the side road, collided with him. The judge held both parties to blame but attributed 80% of the blame to the claimant. The claimant appealed. HELD, ON APPEAL: The judge's apportionment was reasonable. Any vehicle which jumped a queue of stationary vehicles was undertaking an operation fraught with great hazard and which had to be carried out with great care. There was always difficulty in such circumstances in seeing what was happening, especially when emerging from gaps." 31. Not surprisingly Advocate Hall also relied on the decisions in Powell and Pell to argue that Mr Saint must be at least 80% to blame for the accident. But her primary case was that no blame whatsoever attached to Mr Le Feuvre, just as in Clarke v Winchurch

[1969] 1 All E. R. 275. The headnote in that case reads:- "At 4.0 pm on a fine day in October a car facing towards Rotherham was parked on the offside on a six foot parking strip at the edge of the road to Sheffield. The driver had pulled slightly out of the line of the parked vehicles and had his nearside indicator flashing, his intention being to cut across the Sheffield-bound stream of traffic and go on to Rotherham. A bus driver in the Sheffield-bound stream saw that the stream ahead of him was stationary and stopped to let the car across in front of him. He looked in his mirror, drove across in front of the bus, according to his evidence in bottom gear and very slowly, but according to the bus driver "a bit too sharply for my liking", until the front of the car protruded three feet beyond the bus. It there collided with a moped which had been passing the stream on the outside at 15 miles per hour and overtook the stationary bus. The trial judge held that the accident was two-thirds the fault of the moped rider and one-third the fault of the bus driver, for not giving a signal to stop anyone overtaking. He absolved the car driver from any blame on the ground that it was reasonable for him to assume that the bus driver would have signalled if he had seen anybody coming and that there had been no "failure to take reasonable care on his part, because I am unable to prescribe what further care he could have taken which was reasonable or sensible". Held - (i) The bus driver was not to blame in any way for the accident, for he owed no duty to the car driver, his flashing of his lights meant only "come on so far as I am concerned", and he had not seen the moped and owed no duty to the driver to give a signal (ii) (Russell LJ dissenting) the car driver was also not to blame, notwithstanding the need for special care in executing a potentially dangerous manoeuvre, for blowing his horn and flashing his lights in day light would have been ineffective, the last finding of the trial judge (not to be interfered with as one of fact) was in effect that he had come out extremely slowly and carefully, and the suggestion that he ought to have poked his nose out and stopped was a counsel of perfection differing too

little from his actual inching his way out to amount to negligence" Accordingly we now turn to the question whether there was also fault on the part of Mr Le Feuvre in causing the accident. 32. As a driver turning right, Mr Le Feuvre was subject to Rules 179 and 180 of the Highway Code, which read:- "179 Well before you turn right you should use your mirrors to make sure you know the position and movement of traffic behind you give a right-turn signal take up a position just left of the middle of the road Wait until there is a safe gap between you and any oncoming vehicle. Watch out for cyclists, motorcyclists, pedestrians and other road users. Check your mirrors and blind spot again to make sure you are not being overtaken, then make the turn.... Remember: Mirrors B Signal B Manoeuvre". 33. The key to assessing much of Mr Le Feuvre's evidence lies, in our view, in the seemingly innocuous fact that, as was common ground between Mr Saint and Mr Le Feuvre, Mr Le Feuvre slowed down as he approached the junction. If Mr Le Feuvre's way had been clear to turn into La Rue des Bilières, he would not have had to slow down, at any rate to the extent that he did; he could have, and in our view would have, simply proceeded at much the same speed across the B27 and into La Rue des Bilières. The reason why he slowed down was, as Mr Le Feuvre said in evidence and as we find, that there was a black car approaching the junction from the south, overtaking the cars which, it was common ground between the parties, were parked on the west side of the B27 south of the junction. We therefore reject both the evidence of Mr Saint that there was no such northbound car and the suggestion made by Advocate Nicholls to Mr Le Feuvre in cross-examination that this northbound car was not just an invention, but indeed a lie, on the part of Mr Le Feuvre. 34. The driver of this black car (who, as we find, was a man) allowed Mr Le Feuvre to turn into La Rue des Bilières in front of him; had he not allowed Mr Le Feuvre to do so, the driver would have proceeded on his way north up the B27 (and, for good measure, would probably have collided head on with Mr Saint as Mr Saint overtook Mr Le Feuvre's van). The only way in which the driver of the black car could have known that Mr Le Feuvre was intending to turn into La Rue des Bilières was if Mr Le Feuvre had, as he testified and as we find, been indicating his intention to turn right. Again, therefore, we reject Mr Saint's evidence that he was sure that the van was not indicating its intention to turn right. The fault in this regard lay with Mr Saint who, for whatever reason, failed to notice the indicator, just as he failed to observe the black car. 35. That still leaves the question whether Mr Le Feuvre ought to have seen, or possibly heard, Mr Saint behind him and overtaking, or trying to overtake, him. Mr Le Feuvre accepted that he had not seen Mr Saint; indeed he admitted both to Mr Hutchinson when he returned to the premises of Drain It immediately after the accident, and to his wife the same evening, that he did not know where Mr Saint came from. Likewise he accepted that he had not heard Mr Saint. 36. We take first the suggestion that Mr Le Feuvre heard, or ought to have heard, Mr Saint behind him at some point between leaving Drain It's premises and commencing his right turn into La Rue des Bilières. In his evidence in chief Mr Saint said that he would have thought that Mr Le Feuvre would have been able to hear him on his motorcycle. In cross-examination Mr Le Feuvre denied that he must have been able to hear Mr Saint. We heard no quantitative evidence about either the noise generated by Mr Saint's motorcycle

or the noise levels in Mr Le Feuvre's van. Mr Saint described his single cylinder motorcycle as "not quiet". Mr Irwin said that whether Mr Le Feuvre would have been able to hear the motorcycle would depend on a number of factors to which he could not give an exact answer; he contented himself with saying that it was possible that Mr Le Feuvre might have been able to hear Mr Saint. Mr Paine, on the other hand, said in evidence that Mr Le Feuvre's Transit van was old, that such vans are not comfortable vehicles and that they can be quite noisy. He expressed the view that it was entirely possible that Mr Le Feuvre would not have heard Mr Saint's motorcycle, especially at the relatively low speeds at which both vehicles were travelling. 37. Having considered all the evidence, we are not persuaded that Mr Le Feuvre either heard, or ought to have heard, Mr Saint's motorcycle behind him at any time between leaving Drain It's premises and the junction. We decline, therefore, to find any negligence on Mr Le Feuvre's part in this respect. 38. So ought Mr Le Feuvre to have seen Mr Saint? We take this point in two stages, first during the period between leaving Drain It's premises and arriving at the junction, and second at the junction itself. 39. The oral evidence of Mr Saint of the way in which he was riding during the period between leaving Drain It and the junction was as follows. He began by saying that he was riding in a position where he could see past the van; this necessarily meant that he was riding either to the left of the nearside of the van, or to the right of its offside. In either case Mr Le Feuvre would have been able to see him in the van's mirrors. In particular Mr Saint denied ever being directly behind the van; he moved to the left or right of the van depending on how the van was placed in the road. In cross-examination, however, he accepted that the van was driving down the middle of the road. For Mr Saint to have ridden to the right of the offside of the van in that situation would have put him firmly on the wrong side of the road and at obvious risk of colliding with oncoming traffic; for the same reason he sensibly did not attempt to overtake the van during this period. Not surprisingly, perhaps, he then testified that he was riding to the left of the nearside of the van so as to be able to see past the van on the nearside. This would make good sense for the duration of the sweeping left hand bend prior to the junction and we conclude that on the approach to the junction Mr Saint was indeed riding to the left of the nearside of Mr Le Feuvre's van. 40. We have already recorded that the parties' journeys from the point at which the track joins the B27 to the junction took some 25 seconds. In our judgment even a particularly careful driver could not be expected to check his rear view mirrors more than once during that short time, as Advocate Nicholls effectively accepted in his final address. So would Mr Le Feuvre have been able to see Mr Saint when he checked his rearview mirrors (if he did so), or on the one occasion that he ought to have checked them (if he did not)? This, of course, would entirely depend on where Mr Saint was at the moment in question, and which mirror Mr Le Feuvre checked or ought to have checked. Suffice it to say that again we are not persuaded that Mr Le Feuvre can be blamed for not seeing Mr Saint during those 25 seconds or so. Mr Saint might have been in the blind triangle, or on the nearside when Mr Le Feuvre used or ought to have used his offside mirror, or on the offside when Mr Le Feuvre used or ought to have used his nearside mirror. On the evidence, Mr Saint failed to establish on a balance of probabilities that Mr Le Feuvre was

negligent in this respect. 41. Coming to the junction itself, it was Mr Le Feuvre's evidence that he indicated and checked his mirrors (including the two blind spot mirrors) before he slowed down because of the oncoming black car, and that he checked his mirrors again after the black car had signalled to him to proceed. On neither occasion did he see Mr Saint. He accepted that he could not be 100% sure that he had looked in his mirrors but he was, in effect, as sure as he could be that he had done so; as the driver of a van with a substantial blind triangle to its rear, he was conscious of the need to use his mirrors. Nor was he shaken from this evidence in cross examination. Having seen and heard Mr Le Feuvre as a witness, we accept his evidence in this regard, just as we have accepted his evidence that he signalled and that there was an oncoming black car which allowed him to turn. 42. That conclusion requires us to explain why it was that Mr Le Feuvre did not see Mr Saint when he looked in his mirrors at the junction. The answer, we conclude, is that at the time when Mr Le Feuvre looked in his mirrors Mr Saint was behind the van, crossing, as Mr Saint said in evidence, from the nearside to the offside of the van with a view to overtaking it. The increased width of the B27 at the junction afforded Mr Saint the first opportunity to get past the van since leaving work and we conclude that, having seen the van slow down, Mr Saint decided to avail himself of this opportunity. We appreciate that Mr Saint also said in evidence that by the time that Mr Le Feuvre started to turn he was at the crown of the road so that he could see the road ahead, and so that Mr Le Feuvre could see him in the van's mirrors, but we reject that evidence, just as we have rejected Mr Saint's evidence that the van did not signal and that there was no oncoming black car. 43. Advocate Nicholls, however, had a final string to his bow. He contended that it was not enough for Mr Le Feuvre to have used his mirrors (if indeed he had done so); Mr Le Feuvre was at fault in failing to check his blind spots and/or the blind triangle behind the van. The problem with this contention is, it seems to us, simple. How could Mr Le Feuvre check the blind spots, or the blind triangle behind the van, other than by using his mirrors? Advocate Nicholls said in terms in his final address that he was not suggesting that Mr Le Feuvre was obliged to wind his driver's window down and look back along the outside of the van. In our judgment Advocate Nicholls was right not to have made any such suggestion. And even if Mr Le Feuvre had done so, we conclude that he would still not have seen Mr Saint because Mr Saint was crossing from the nearside to the offside behind the van at the relevant moment. 44. Mr Irwin said in his evidence in chief that it was essential for Mr Le Feuvre to look over his shoulder as well as in his mirrors, but we wholly fail to see how that would have improved the situation. If Mr Le Feuvre had looked over his shoulder down the interior of the van, all he would have seen was the inside of the rear doors; and if he had looked through the driver's window, he would not have seen anything more than he could see in his mirrors. Again, either way he would not have been able to see Mr Saint crossing behind his van. When Advocate Nicholls put it to Mr Paine in cross-examination that Mr Le Feuvre needed to do more than look in his mirrors, Mr Paine's answer was that he was not sure what else Mr Le Feuvre could have done. We entirely agree. In our judgment this final point does not avail Mr Saint. 45. We should add that in reaching these conclusions we have not overlooked the conflict of evidence about

where the accident took place. As appears from the rival accounts which we have set out in paras.10 and 11 above, Mr Saint said that the accident occurred just as Mr Le Feuvre started to turn, whereas Mr Le Feuvre stated that it happened just as he was about to enter La Rue des Bilières. 46. The only damage caused to the van in the accident was a horizontal crease towards the top of the driver's door under the window, approximately 1.08 metres above ground level. It was common ground between the experts that this crease resulted from contact with the clutch lever of the motor cycle, which protruded beyond the nearside handle bar. The experts also agreed that the damage sustained by both the van and the motor cycle was consistent with a glancing blow type of impact. Advocate Nicholls submitted that this pattern of damage was consistent with Mr Saint's account of how the accident had happened; if the van had almost completed the turn, as Mr Le Feuvre contended, the front wheel of the motorcycle would have impacted the van, not the clutch lever. 47. It is, however, important to remind ourselves that the junction is a Y junction, so Mr Le Feuvre's van would never have been at more than 45 degrees to Mr Saint's motor cycle. In addition it was Mr Le Feuvre's evidence, as set out in para.11 above, that he instinctively tried to swerve to the left when he saw the motorcycle. In his oral evidence he added that when he stopped after the accident the van was at less than 45 degrees and that all he had to do was to turn the steering wheel to the left in order to park his van in front of the parked cars on the west side of the B27. Advocate Nicholls did not challenge this last piece of evidence in cross-examination and we accept Mr Le Feuvre's account of what he did. It seems to us that in those circumstances the impact between the van and the motorcycle would again have been a glancing blow consistent with the damage found to both the van and the motorcycle. Accordingly we reject Advocate Nicholls' submission that the damage to the van and the motorcycle was consistent only with Mr Saint's version of events. In our view it is equally consistent with Mr Le Feuvre's case and therefore casts no doubt on the conclusions we have already reached. 48. In summary, we find that Mr Le Feuvre was properly turning right into La Rue des Bilières, having slowed down because of the oncoming black car, having signalled his intention to turn right and having checked in his mirrors before turning. He did not hear, and could not reasonably have been expected to hear, Mr Saint behind him. He did not see, and could not reasonably have been expected to see, Mr Saint preparing to overtake him because at the moment when he checked his mirrors Mr Saint was in the blind triangle behind the van, crossing from the nearside to the offside. Mr Le Feuvre was not guilty of any negligence and he bears no responsibility for the accident. The accident was the fault of Mr Saint, and Mr Saint alone, in seeking to overtake Mr Le Feuvre's van at a time and place, and in circumstances, when it was unsafe to do so. Accordingly we dismiss Mr Saint's claim against Mr Le Feuvre in its entirety. (B) Damages 49. In the light of our decision that Mr Le Feuvre was not responsible in any way for the accident, the quantum of the damages to which Mr Saint might have been entitled is academic. Since, however, damages were the subject of evidence and argument before us, and for the sake of completeness, we proceed to express our conclusions on this aspect of the case as well. 50. In relation to medical matters both sides called expert evidence, in the persons of Mr G.

W. Bowyer (a consultant in trauma and orthopaedic surgery at Southampton General Hospital) for Mr Saint, and Mr D. J. Pring (a consultant orthopaedic surgeon from Guernsey) for Mr Le Feuvre. In the accident Mr Saint suffered various soft tissue injuries, namely bruising to his left little finger (where he had been holding the left handlebar of his motorcycle), bruising to his left hip (where he struck the van) and grazing to his right shin. There is no suggestion that any of these injuries caused any lasting problems. The fracture of his right ankle, however, was more serious; more particularly, X-rays and a CT scan showed that multiple bone fragments had been avulsed from the anterior aspect of the distal tibia at the ankle, and from the tip of the medial malleolus. Further X-rays taken in January 2012, and a subsequent MR scan, showed degenerative changes throughout the right ankle. 51. As pleaded in his Schedule of Loss dated 17 th April, 2014, and as amended by his "Summary of Claims as per Schedules of Loss Filed", Mr Saint's claims (together with Mr Le Feuvre's response as set out in his Counter Schedule, also as amended) may be summarised as follows:- Plaintiff Defendant (1) Past Losses (a) Cost of medical treatment GP Fees £158.50 £158.50 (b) Travel expenses Expenses for medical appointments £55.69 £55.69 (c) Loss of earnings (i) Net loss of earnings £19,774.40 £5,168.00 (ii) Loss of discretionary Christmas bonus £304.20 £nil (iii) Attending on Mr Bowyer £106.80 £106.80 (d) Helmet expense £200.00 £200.00 (e) Excess on insurance £100.00 £100.00 (f) Gardener expenses £2,120.00 £780.00 Total past losses £22,819.59 £6,568.99 (2) Future Losses (a) Medical treatment and physiotherapy (i) Chance of ankle arthroscopy and debridement £3,189.08 £nil (ii) Chance of ankle replacement £1,414.54 £nil (iii) Chance of revision surgery for ankle replacement £312.81 £nil (iv) GP Fees £2,265.94 £500.00 (b) Loss of earnings (i) During possible ankle arthroscopy £1,450.06 £1,218.93 (ii) During possible ankle replacement surgery £1,048.38 £622.61 (c) Smith and Manchester award £13,790.40 £nil (d) Gardener expense £66,785.60 £7,470.24 Total Future Losses £90,256.81 £9,811.78 (3) General Damages Pain, suffering and loss of amenity £17,500.00 £10,100.00 52. All Mr Saint's figures for future losses (except for the Smith and Manchester award) were inclusive of a net discount rate of - 1% per annum; all Mr Le Feuvre's equivalent figures for future losses were inclusive of a rate of +2.5 % per annum. 53. We now take in turn each of the disputed items of Mr Saint's claim.

- (1) Past Losses Past loss of earnings 54. The ankle injury that Mr Saint suffered on 7 th April, 2011, was not his only medical problem. In about July 2010 he had sustained an injury to his right shoulder while at work, which had caused him to be off work for five months from 29 th October, 2010, until 25 th March, 2011. He had, therefore, been back at work for less than two weeks before the accident. Following the accident he was off work until early July 2011. He returned to work for eight weeks before being off work again from 29 th August, 2011, until 9 th March, 2012. Finally, on 11 th July, 2012, he underwent surgery at the Jersey General Hospital for the excision of a Morton's neuroma in the third web space of his right foot, returning to work on 20 th August, 2012. 55. There were two issues in respect of this item of Mr Saint's claim. First, Advocate Hall accepted that the period when Mr Saint was off work from April to 1 st July, 2011, was due to the injury to his ankle, hence the figure of

£5,168.80 (originally £6,736.80) which she was prepared to concede (see para.51(1)(c)(i) above). Conversely Advocate Nicholls accepted that, since it was common ground between the doctors that the Morton's neuroma was, on a balance of probabilities, unrelated to the accident on 7 th April, 2011, Mr Saint could not recover from Mr Le Feuvre in relation to his period off work in July and August 2012. That left his time off work from late August 2011 to early March 2012. It was Mr Saint's case that this period was also referable to his ankle injury. Advocate Hall, on the other hand, contended that this period was due to the Morton's neuroma (and/or to the previous shoulder injury) and that Mr Saint could not, therefore, recover in respect of it. The parties were agreed that if the Tribunal were to find that this period off work was due both to the ankle injury and to the Morton's neuroma (or the shoulder injury), the correct course was for us to apportion the sum claimed by Mr Saint between the causes for his being off work. The second issue arose from Advocate Hall's contention that, quite separately, Mr Saint had failed to mitigate his loss in that he had taken no steps to see whether Drain It would have been prepared to employ him in an administrative role between August 2011 and March 2012. 56. So far as the first issue is concerned, Mr Saint's evidence in his second statement read as follows:- "21. I was keen to get back to work having had the extended period of time off prior to the accident and indeed I returned to work on Monday, 4 July 2011 but I found walking around on building sites and trying to get in and out of trenches to inspect pipework was getting more and more difficult and causing further pains in my right ankle. 22. On 5 July 2011 I was seen again at the Fracture Clinic as my ankle had healed well although I was left with a minimal limp. 23. After working for 2 months I could not bear the pain and just felt that continuing working was not helping my ankle to recover. I stopped work at the end of August 2011 hoping that a couple of weeks rest would help the ankle recover, but when it still had not improved I went back to the GP on 28 September 2011 and my GP signed me off unfit to work. 24. I returned to the GP on 7 November 2011 as notwithstanding that I was still doing my exercising at home the pain had been getting worse again. The GP asked me to go back in a few weeks if it was not getting any better and I returned on 4 January 2012 as I was keen to return to work. My GP referred me for an emergency appointment to see the orthopaedic surgeon. 25. I was given an emergency Fracture Clinic appointment on 24 January 2012 where they took an x-ray of my right ankle which showed osteoarthritic changes and osteophyte formation on the margin of the tibia. I was advised at that time that the injury to my right ankle had caused osteoarthritis and that I may have tib posterior tendonitis and Morton's neuroma. I subsequently had an MRI scan which confirmed the Morton's neuroma and the degenerative changes to my ankle. 26. I managed to finally get back to work on Monday, 12 March 2012. I had to adjust my working practices a little and tried to take a more supervisory role. But this can be a little difficult when I work as part of a two man team and this puts a lot more pressure and work on my team-mate." 57. Mr Saint's evidence in cross-examination may be summarised as follows. (a) When he saw his general practitioner in early 2012, reporting problems with his right ankle, he did not think that the pain included pain in his forefoot. However, when he was seen at the fracture clinic some two weeks later, he was having pain in his forefoot, which led the consultant, Mr Tehran, to write on 25 th January, 2012:- "There

is also tenderness in the 3rd web space (Morton's neuroma)." b) He could not recall when the forefoot pain started. (c) He accepted that he was suffering forefoot pain during the period from September 2011 to March 2012 but he doubted that this pain was the cause of his taking time off work. (d) He did not agree with Advocate Hall's suggestion that he took the time off work from September 2011 to March 2012 because of both his ankle and the forefoot pain.

58. Turning to the expert evidence, in an email dated 12 th May, 2014, Mr Bowyer's secretary recorded Mr Bowyer as stating:- "I think the initial period of 3 months and following 6 months off work represent an appropriate time off and can reasonably be attributed to the material accident." The "following 6 months off work" is the period with which we are presently concerned.) In his medical report dated 20 th May, 2014, however, Mr Pring expressed the view that the Morton's neuroma had developed prior to 9 th June, 2011, on which date the physiotherapist had recorded "pain in ball of foot", and that the neuroma was symptomatic by 26 th August, 2011. He concluded that on balance the neuroma was a symptom which prevented Mr Saint from working during the period in question.

59. In his oral evidence (on the second afternoon of the trial) Mr Bowyer, while agreeing with almost all aspects of Mr Pring's report, disagreed with Mr Pring's conclusion as set out in the preceding paragraph. More particularly Mr Bowyer accepted that the physiotherapist's note of 9 th June, 2011, was the first reference he had been able to find in Mr Saint's medical records to forefoot pain although Mr Saint was not formally diagnosed as having a Morton's neuroma until May 2012. He added, however, that Mr Saint's overwhelming problem was that his ankle was painful and that it was the recurrence of that pain which caused Mr Saint to take time off between August 2011 and March 2012. He also commented that the forefoot pain from a Morton's neuroma would be clearly distinguishable from pain caused by an ankle injury.

60. Both doctors were referred in the course of their evidence to two "Outcome Measures" relating to Mr Saint recorded by the physiotherapist at the Jersey Hospital as follows:-

Measure	Pre Score	Date	Post score	Date
LL Functional	36/80	26/5/11	60/80	7/9/11
BPI	13/40	49/70	26/5/11	6/40
			12/70	7/9/11

Advocate Hall cross-examined Mr Bowyer about these figures on the basis of information in an email dated 23 rd May, 2014, from the medical records manager of the Jersey Hospital (said to be based on information from the physiotherapy department) which read:- "The physiotherapist has used two recognised patient rated outcome measures. The "Lower Extremity Functional Scale" is from 0 - 80, and "0" is the best score, so this patient's score has deteriorated. The "Brief Pain Intervention" has two sections, one is 0 - 40 and the other is 0 - 70. The first section questions the patient about their levels of pain, and the second section questions the impact that the pain has on different aspects of their life. So this patient's scores have improved in both sections." (It was common ground between the parties that "LL Functional " was the same as the Lower Extremity Functional Scale.) Mr Bowyer pointed out that on this basis the Outcome Measure showed that Mr Saint's ankle function had deteriorated between May and September, albeit that the pain had improved.

61. Finally Mr Bowyer was asked about a letter from Mr Tehran dated 5 th July, 2011, in which Mr Tehran had written:- "I saw Mr Saint ... on Monday 4th July 2011. He has been seen in our clinic because of his right ankle avulsion fracture after a [motor] bike accident 3 months ago. He has been doing very well and he has found the

physiotherapy very helpful. He is already on his bike and is due to go back to work on Monday. On examination he walks with a minimal limp. His right ankle movements are almost equal to the left and there are no tender points. I have advised him to continue with his activities. I have discharged him from clinic" Mr Bowyer was asked how, in the light of Mr Tehran's observations, he could explain the need for Mr Saint some eight weeks later to take a further six months off work. He accepted that it was "odd on the face of it" until one understood the extent of Mr Saint's injuries, which were a combination of a soft tissue injury and a fracture; the symptoms of the soft tissue injury would manifest themselves first, followed by the symptoms from the more serious injury in the form of the fracture. 62. Mr Pring was not in Court when Mr Bowyer was giving evidence on the second day of the trial. Conversely Mr Bowyer was not present in Court when Mr Pring gave evidence on the third day of the trial. When Mr Pring came to give his oral evidence, he was able to refer to the Instructions for the use of the Lower Extremity Functional Scale, which demonstrated (as we find) that, contrary to what the Hospital had said in their email of 23 rd May, the lower the score, the worse the patient's ability to perform everyday tasks. We also have no reason to suppose that the physiotherapist did not apply the Instructions properly when recording Mr Saint's "LL Functional" score. These conclusions, of course, cast a very different light on the Outcome Measures. In particular Mr Saint's score on the Lower Extremity Functional Scale showed that his function had improved, not deteriorated, between May and September 2011, thus bringing his functional score into line with his pain score. A functional score of 60/80 would fall into the category of "A little bit of difficulty" with the activity in question. 63. In relation to Mr Saint's shoulder injury, Mr Pring drew attention to a letter from Mr Tehran dated 18 th August, 2011, which read as follows:- "I reviewed your patient in the clinic today following his right shoulder [coracoid] process ultrasound guided injection that was done by the radiologists following his local tenderness. He has not found it helpful and has not had any change although his shoulder is getting better at a very slow pace. On examination today he has normal abduction up to 135 degrees. His external rotation is equal to the left and up to 65 degrees. His internal rotation is however limited to L1 compared to T6 on the left side. I discussed the matter with him and he is not very keen on further Physiotherapy and would prefer to do his own exercises. I advised him that at this stage I would not recommend any surgical intervention." When asked by Advocate Hall what the factors were which caused Mr Saint to be off work from August 2011 Mr Pring identified three, namely (a) hindfoot pain from the fracture. He added that he was in no doubt that Mr Saint was in pain from the fracture; (b) the Morton's neuroma, albeit that it was not formally diagnosed until 2012; and (c) Mr Saint's shoulder injury. 64. It was obviously unfortunate that, through no fault of anyone in Court, the cross-examination of Mr Bowyer in relation to the Outcome Measures proceeded on what we have found was a false basis. Doing the best we can in those circumstances on the basis of the evidence presented to us, our findings in respect of the period which Mr Saint spent off work between August 2011 and March 2012 are as follows. (a) Although Mr Saint may still have been suffering some discomfort from his shoulder in August 2011, we are not persuaded that his shoulder was a significant problem at this time. We therefore dismiss the suggestion that the shoulder injury played any part in his time off

work during this period. (b) We accept that Mr Saint was in pain from his ankle. Indeed it seemed to us that it was effectively common ground between Mr Bowyer and Mr Pring that the injury to Mr Saint's ankle (which both doctors accepted was serious) was at least a factor in Mr Saint being off work during this time. (c) We recognise that Mr Bowyer had had the advantage of seeing Mr Saint in November 2012, whereas Mr Pring had to rely solely on Mr Saint's medical records. Nevertheless we prefer the evidence of Mr Pring that the Morton's neuroma was also a factor in Mr Saint's being off work for the period in question, not least because the Outcome Measures, properly understood, do not support Mr Bowyer's view that there had been a deterioration in the function of the ankle between May and September 2011. (d) In our judgment, Mr Saint's ankle injury was the major factor in his being off work during this period. We consider that a fair apportionment would be 70:30 between the ankle injury and the neuroma. Accordingly if we were awarding Mr Saint damages in respect of this period, we would (subject to the second issue below) have awarded him 70% of his claimed £14,606.40, namely £10,224.48. 65. Turning to the second issue, when Mr Saint returned to work in March 2011, he did so in an administrative role; this involved less manual work. He explained in cross-examination that he was offered this administrative role just to get him back to work. At the start of his evidence in chief he had said, when asked if he hoped to continue his job at Drain It, "I don't see why not", adding that he was now undertaking more senior, supervisory work. He also accepted that he did not, during the period from late August 2011 to early March 2012, ask if an administrative role was available at Drain It; he did, however, state that there was no such administrative position at that time because his boss was playing a larger role in the running of the company. In cross-examination Dr Bowyer accepted that the injury to Mr Saint's foot would not have prevented him from doing administrative work from August 2011 onwards but he subsequently added that pain can be tiring and wearing and that it may still make a sedentary job uncomfortable. 66. In our judgment it would have been sensible for Mr Saint to have enquired whether an administrative role was available during the lengthy period from late August 2011 to early March 2012. On the other hand we bear in mind his evidence that no administrative role was available at the time. The burden of proving that Mr Saint failed to take reasonable steps to mitigate his loss in this regard lies on Mr Le Feuvre, the question being one of fact. On balance we are not persuaded that Mr le Feuvre has discharged that burden. Accordingly we would not have deprived Mr Saint of his damages in respect of this item on the ground of a failure to mitigate. 67. It follows that if Mr Saint had been entitled to damages from Mr Le Feuvre, we would have awarded him a total of £15,392.48 in respect of this item, namely £5,168.00 for the period from April to July 2011 and £10,224.48 for the period from August 2011 to March 2012. Discretionary Christmas bonus 68. In her letter dated 12 th March, 2012, to Walkers, Ms Cadoret of Drain It wrote as follows:- "Further to your recent letter dated 21st February in relation to Mr Paul Saint's accident on 07/04/2011, please find below the following information that you have requested. Drain It Ltd do normally award employees an annual bonus at Christmas (approx ,500), and cost of living/ performance related pay rise (neither of these are guaranteed)." 69. Advocate Hall's objection to this head of claim was simple; Mr Saint had failed to adduce any evidence to the

effect that he would have received any Christmas bonus in 2011, whether the £500 mentioned by Ms Cadoret in her letter or the £304.20 claimed in his Schedule. Nor was this a surprise point which Advocate Hall first raised at the trial; she had taken the point in Mr Le Feuvre's Counter Schedule and at the Pre-Trial Review on 13 th May, 2014. We accept Advocate Hall's objection. Advocate Hall having made clear that Mr Le Feuvre put Mr Saint to proof of this item, it was for Mr Saint to call evidence to substantiate his claim. He did not do so, as Advocate Nicholls accepted in his final address. Accordingly we would have rejected this head of Mr Saint's claim in any event. Past gardener expenses 70. Mr Saint's Schedule asserted that he had "employed a gardener on a casual basis two or three times a month" between April 2011 and December 2013. But as the Court pointed out, and Advocate Nicholls accepted in his final address, the only evidence properly so-called which we had from Mr Saint in relation to this item was para.47 of his second witness statement, which read:- "Since the accident has occurred I have had to employ a Polish colleague to help me with my garden. I pay him £40 a week approximately once a month for 5/6 hours work." On this basis the claim under this head would be no more £40 a month for 37 months, namely £1,480. Advocate Nicholls accordingly conceded that his claim under this head should be reduced from the £2,120 claimed in the Schedule of Loss to £1,480. Although in the Counter Schedule Mr Le Feuvre had offered nothing in respect of this item, in her closing address Advocate Hall indicated that she would accept 50% of this reduced figure, namely £740. 71. The property in which Mr Saint lives with his partner and their son belongs to his partner's mother. It is apparent from the photographs which were shown to us that the garden at the property is extensive. Part of it is laid to lawn, while other parts are more like a field with mature trees. There are a number of high hedges surrounding the property, many of which are on banks, which require regular trimming. As Mr Saint said at para.41 of his second statement:- "One big difference is my limitation in the garden. I [now] employ a gardener to help me with the heavy work, footing ladders when hedge trimming, even mowing the lawn with the petrol mower as the [ground] is still uneven. My garden, as exhibited, is like a small field and I am not able to maintain it like I previously could." As he also explained at para.28:- "My ankle does give way. There are certain positions which will cause my knee to drop, all of a sudden like a trapped nerve. As I know this happens on rough terrain, slopes and inclines, I try to take extra care." In his oral evidence he explained that he had small hand machinery to manage the garden and that it now took him 40% or 50% longer to maintain the garden than before the accident. He found the slopes in the garden tricky with his injured ankle, so the gardener had been doing all the rough mowing, brush cutting and hedging. Mr Bowyer in his evidence said that mobility and a degree of activity were to be encouraged in those suffering from the sort of injury that Mr Saint had sustained, and that walking with a powered mower would be entirely reasonable. He confirmed, however, that he would expect Mr Saint to have difficulty in maintaining an area as large as that of the property and that uneven ground or slopes would tend to be a problem. 72. In her final address Advocate Hall submitted that Mr Saint could have done more himself in his garden if he had taken painkillers. Mr Saint said in evidence that he would only take painkillers if the pain became really bad, a view with which we have some sympathy; we would not,

therefore, have reduced Mr Saint's damages on this account. More generally, whilst we accept that Mr Saint's ability to maintain his garden was impaired as a result of the accident, we are not persuaded that the difficulties were as great as he suggested. We also note that Mr Saint now has a young son and he would, in our view, naturally wish to spend time with his son that he would previously have spent working on his garden. Finally, we consider that just as his Morton's neuroma contributed towards his time off work between August 2011 and March 2012, and then caused him to be off work in July and August 2012, so also part of the reason for his employing a gardener during this period was his neuroma. In those circumstances, whilst we think that the figure of £740 suggested by Advocate Hall was too low, we would have declined to award Mr Saint the full £1,480 suggested by Advocate Nicholls. In our judgment the sum of £1,000 would have fairly compensated Mr Saint for his past expenses in employing a gardener necessitated by the accident. 73. In summary, we would have awarded Mr Saint damages of £17,013.47 under this head of Past Losses, as follows:- (a) Cost of medical treatment £158.50 (b) Travel expenses £55.69 (c) Loss of earnings (i) Net loss of earnings £15,392.48 (ii) Loss of discretionary Christmas bonus £nil (iii) Attending on Mr Bowyer £106.80 (d) Helmet expense £200.00 (e) Excess on insurance £100.00 (f) Gardener expenses £1,000.00 Total past losses £17,013.47

- (2) Future Losses The correct discount rate 74. As we have already indicated, the matter of the correct discount rate applies to all Mr Saint's claimed future losses except the Smith and Manchester award. It is therefore convenient for us to address this issue at this stage. The discount rate dictates the multiplier in the Ogden Tables which is to be applied to the claim in question. To take one example, the discount rate of -1% as proposed by Mr Saint would produce a lifetime multiplier of 59.63, whereas the rate of +2.5% as urged by Mr Le Feuvre would more than halve the multiplier to 26.52. 75. The issue of the so-called discount rate first raised its head at the Pre-Trial Review held on 13 th May, 2014, when the Court's attention was drawn to the fact that the parties would be applying very different discount rates to their respective calculations in respect of Mr Saint's future losses. The Court was informed that Mr Le Feuvre would be applying the figure of +2.5% in accordance with what Advocate Hall said was the practice in Jersey as adopted from the position in England, whereas Mr Saint would be applying his figure of -1% following the decision of the Privy Council delivered in March 2012 in *Simon v Helmot*

[2012] UKPC 5 , on appeal from the Court of Appeal of Guernsey. There was a brief discussion between the Commissioner and both Counsel at that hearing during which reference was made to the extensive expert evidence which had been adduced in the *Helmot* case. No provision had been made in the present case for any equivalent expert evidence and neither Advocate Nicholls nor Advocate Hall seriously suggested that the sums in issue between Mr Saint and Mr Le Feuvre could justify the calling of such evidence. Finally, neither the date fixed for the hearing (then some three weeks away), nor the time estimate for the hearing (namely three days), could possibly accommodate such expert evidence. Accordingly the Court ordered on 13 th May that the issue of the discount rate was to be argued at the trial simply on the authorities, and without the calling of expert evidence.

76. In his Skeleton Argument Advocate Nicholls asserted (at para.51) that:- "All multipliers used in the Plaintiff's schedule of loss have been calculated using a net discount rate of -1% per annum as approved by the Privy Council in *Simon v Helmot*" As, however, Advocate Nicholls accepted in his final address, that assertion was incorrect. In *Helmot* the Privy Council had approved the application of two separate rates, a rate of +0.5% for the future losses that were not earnings related and a rate of -1.5% for the earnings related elements of the plaintiff's future losses. The correct position was that the figure of -1% that Mr Saint sought to apply was, Advocate Nicholls advised the Court, based upon actuarial advice in the light of the *Helmot* decision. 77. In his final address Advocate Nicholls suggested that there were three options open to the Court, namely:- (i) to follow the position in England; (ii) to adopt the position in Guernsey following the *Helmot* decision; or (iii) to apply whatever rate(s) the Court felt to be appropriate. Although in his Skeleton Argument Advocate Nicholls had submitted that *Helmot* should be applied in Jersey, his primary submission in his final address was that the Court should adopt option

- (c) and apply his suggested -1%. That, he contended, was the only way in which the Court could achieve its fundamental objective of ensuring that Mr Saint would receive full compensation for his loss. With those considerations in mind, we turn to the decision in *Helmot*. 78. The plaintiff in *Helmot* was a 28 year old cyclist who was involved in a head on collision with the defendant's car when the defendant pulled out to overtake. The defendant admitted liability. The plaintiff suffered catastrophic injuries, such that he would require 24 hour care for the rest of his life. Lord Hope set out the subsequent procedural history in his judgment in the Privy Council, as follows:- "4. The case proceeded to trial in October and November 2009 before Deputy Bailiff Collas and three Jurats. On 14 January 2010, after a hearing which lasted for six weeks, the Royal Court awarded the [plaintiff] damages in the sum of £9,337,852.27, with interest at the rate of 2% from 1 August 2008 until payment. The [plaintiff] had contended that two discount rates should be used for the calculation of his future recurring losses: 0.5% for non-earnings related losses and -1.5% for earnings related losses, including his own loss of earnings. The [defendant's] contention was that there should be single discount rate of 2.5%. The Royal Court applied a single discount rate of 1%. 5. On 12 February 2010 the [plaintiff] filed a notice of appeal in which he asked that the judgment of the Royal Court should be set aside to the extent that it depended upon a discount rate of 1% and that it should be re-calculated based upon discount rates of -1.5% for earnings related losses and 0.5% for other losses. On 25 February 2010 the [defendant] filed a cross-appeal in which he contended that the judgment of the Royal Court should be set aside and that a single discount rate of 2.5% should be substituted. On 14 September 2010 the Court of Appeal (Sumption, Jones and Martin JJA) allowed the appeal and dismissed the cross-appeal. In place of the 1% discount rate that had been applied to all future losses by the Royal Court it substituted a discount rate of -1.5% for earnings related losses and 0.5% for other losses. These changes may seem small in percentage terms, but the effect of the Court of Appeal's judgment was to increase the total award of damages by about £4.5m. On 22 July 2011 the Court of Appeal granted leave to appeal to the Board. 6. As the Court of

Appeal said at the outset of its judgment, the issues on this appeal can be understood only in the light of the developing law and practice of the courts in England and Wales: para 4. The English common law has persuasive force in Guernsey in areas not governed by Guernsey statutes or Guernsey customary law, in much the same way as it has in Scotland. In *Morton v Paint* (1996) 21 GLJ 61, which was a case about occupiers' liability, Southwell JA said that it was common ground that in relation to the law of torts it has been customary for the Guernsey courts to adopt English common law as it has been developed by the English courts. The law relating to the assessment of damages for personal injury is one of the areas in which there has been a large volume of litigation in England. Here too it is a source that may legitimately be referred to in the search for answers to problems that the bailiwick has not previously encountered. 7. This is not to say that the solutions that have been adopted in English law will be applied in Guernsey without an inquiry as to whether the underlying conditions in the respective jurisdictions are truly comparable. There is no reason why a discount rate calculated in accordance with English common law principles should not be adjusted in order to take account of differences between the two jurisdictions, as the Deputy-Bailiff accepted when delivering the judgment of the Royal Court, para 182. But before that stage is reached it is appropriate to focus on the English approach." 79. Lord Hope then explained the introduction in England in 1996 of the power to order periodical payments with the consent of the parties, and in 2003 of the power to make such orders without consent, neither of which powers had been adopted in Guernsey (or for that matter in Jersey). He continued:- "9. For the time being however it is the way English law dealt with such cases before the 1996 Act was enacted that should be referred to for guidance. It is the closest one can come to the system that currently operates in Guernsey. The assessment of future loss in English law 10. Leaving aside the changes introduced by statute, English law requires that an award of damages must take the form of a single lump sum. The award has to take account of all the elements of future loss as well as all the loss for the past. The inevitable delay in the provision of compensation for past losses can be made good by an award of interest at the appropriate rate on those parts of the lump sum that relate to the past. But the payment as part of the lump sum of an amount that is to compensate for losses to be incurred in the future gives rise to a different problem. Account must be taken of the fact that the money is being paid now for losses that will not arise until some date in the future. The adjustment that has to be made to the lump sum to account for this will affect the total amount to be paid by way of damages. 11. In the majority of cases this is unlikely to have a very large impact on the total award. But in cases where the injury is one of maximum severity the lump sum is already so large that it will make a very great difference to the result. It can make all the difference between the adequacy and the inadequacy of the award to meet the losses which the injured party will sustain in the future. It can make all the difference too to the extent of the defendant's obligation to compensate the plaintiff for his injury. The object of the award of damages for future expenditure is to place the injured party as nearly as possible in the same financial position as he or she would have been in before the accident. They should not be left, at the end of the period during which the loss is to continue, in a better financial position that they would have been in apart from it:

Hodgson v Trapp

[1989] AC 807, 826 per Lord Oliver of Aylmerton. The aim is to award such a sum of money as will amount to no more, and at the same time no less, than the net loss: *Wells v Wells*

[1999] 1 AC 345, 390. 12. It has to be recognised that it is not possible, when dealing with losses that will be incurred in the future, to achieve perfect accuracy. As Lord Steyn said in *Wells v Wells* at p.383, perfection in the assessment of future compensation is unattainable. But, just as there can be no good reason for a shortfall in the amount required to meet the outlays for nursing care in the future, there can be no reason for requiring the defendant to pay more than is needed to compensate the injured party for these outlays. It follows that the calculation should make the best use of such tools as are available." 80. Lord Hope noted (at para.17) that in *Wells v Wells* the House of Lords decided that the English courts should adopt a discount rate of 3% as the rate for general use until such time as the Lord Chancellor used the power under section 1 of the Damages Act 1996 to prescribe the rate of return that was to be expected from the investment of a lump sum award. He then continued:- "Developments since *Wells v Wells* 19. On 28 June 2001 by the Damages (Personal Injury) Order 2001 (SI 2001/2301) the Lord Chancellor, Lord Irvine of Lairg, fixed the rate of return for England and Wales and Northern Ireland at 2.5%. ... On 27 July 2001, in the light of criticisms that he had relied on inaccurate figures as to the yield on ILGS, the Lord Chancellor issued a fresh decision which again set the rate at 2.5%. 20. The Lord Chancellor said, in a statement of his reasons for that decision, that in determining the discount rate he had applied the appropriate legal principle as to the object of the award of damages laid down in *Wells v Wells*. Although the statute empowered him to fix different rates of return for different classes of case, he had decided upon a single rate to promote certainty and because it would be easy to apply in practice. It was not his intention to make frequent changes to take account of every shift in market conditions. He had regard to the principle laid down in *Wells v Wells* that the assumed rate of return should be based on the yield of [index-linked government securities "ILGS"]. He found that the average of the gross redemption yields of ILGS over a period of three years at an assumed rate of inflation of 3% was 2.46%. Discounting for tax payable in the hands of a UK taxpayer reduced this figure to 2.09%. Noting that the intervals used in the Ogden Tables for the calculation of the multiplier was 0.5%, he chose not to round his figure down to the nearest multiple which was 2% but to round it up to 2.5%. As the Court of Appeal noted in para 10 of its judgment, his only explanation for that decision was that he had taken account of matters which he considered were relevant to the setting of a discount rate which was just as between claimants as a group and defendants as a group. 21. He made it clear in his statement that he did not accept that the rate of return on ILGS was a pure and undistorted measure of the real rate of return that markets would afford in relation to investments with minimal risk. He had had regard to the fact that the Court of Protection had continued, even in the light of *Wells v Wells*, to invest in multi-asset portfolios including an equity element although the House of Lords in *Wells v Wells* had chosen not to be guided by its practice. This indicated that there were sensible, low-yield investment

strategies available to claimants which would enable them to achieve a rate of return at 2.5% or above without being unduly exposed to risk in the equity markets. He also said that he had taken account of the fact that it was likely that claimants would not be advised to invest solely in ILGS but rather in a mixed portfolio in which any risk would be managed so as to be very low. This view was supported by the experience of the Court of Protection and the response of the expert financial analysts whom he had consulted. 22. The Lord Chancellor's determination was criticised at the time as being too favourable to defendants. Section 1(2) of the Damages Act 1996 provides that the fixing of a rate by the Lord Chancellor shall not prevent the court taking a different rate of return if any party to the proceedings shows that it is more appropriate in the case in question. But attempts to persuade the courts to take a fresh look at the issue did not meet with success. In *Warriner v Warriner*

[2002] EWCA Civ 81 ,

[2002] 1 WLR 1703 the Court of Appeal held that this would only be appropriate if the case came into a category that the Lord Chancellor had not considered or had special features or circumstances and that, as there was nothing in the facts of the case of that character, the claimant should not be permitted to adduce expert evidence as to the appropriate multiplier. In *Cooke v United Bristol Healthcare NHS Trust*

[2003] EWCA Civ 1370 ,

[2004] 1 WLR 251 the Court of Appeal held that evidence that the effect of inflation on future care costs would be grossly underestimated if the effect of inflation were only built into the multiplier by means of the Lord Chancellor's discount rate amounted to an illegitimate assault on that rate and on the efficacy of the 1996 Act and should not be admitted. Laws LJ said in para 29 that it was a premise of the Lord Chancellor's order that the effects of inflation in claims for future loss were to be catered for solely by use of the multiplier which was conditioned by the discount rate. 23. No fresh determination has been made under section 1(1) of the 1996 Act since the Orders of 2001 and 2002...." 81. Lord Hope then explained the position in Guernsey, as follows:- "26. Statutes of the United Kingdom Parliament may relate to the bailiwick, either because they are expressed to apply there directly or upon the making of a subsequent Order in Council or ministerial order: *Jersey Fishermen's Association Ltd v States*

[2007] UKPC 30 , [2007] GLR 36, para 1. But the Damages Act 1996 is not one of them, and it has no equivalent in the laws of Guernsey. Guernsey law and English law both accept that the injured party is entitled to be provided with a sum of money which will put him in the same position as if he had not sustained the wrong for which he is to be compensated. But there is no provision in Guernsey for the award of damages for personal injury other than by way of a lump sum. And there is no statutory discount rate. Regard may be had to the common law of England for guidance as to how to adjust the present value of a lump sum to allow for the fact that it is to be paid now to cover losses that will be incurred in the

future. The common law which is relevant is that which was analysed and developed in *Wells v Wells*. Significant changes in the yields on ILGS would justify adopting a different rate from that which was adopted in that case. But decisions about the effect of the 1996 Act or its application have no bearing on the way the lump sum is to be calculated according to Guernsey law. 27. It is common ground that there are other factual differences too. They were listed by the Court of Appeal in para 14 of its judgment. First, the rate of inflation within the bailiwick has been fairly consistently about 0.5% higher than in the UK RPI which is tracked by ILGS. This state of affairs can be expected to continue. Second, income tax rates are lower in Guernsey than those that are payable by persons ordinarily resident in the UK. This means that the net yield of ILGS to a Guernsey resident will be different from that which will be enjoyed by a person holding the same securities who is taxable in the UK. Third, the statistical information which is available to track the movement of prices and earnings is more limited for Guernsey than it is for the UK. For that reason at least, it is less reliable. These factual differences are all capable of being accommodated by adjustments to the calculation of the award that would be appropriate if this case was being decided in England. There is nevertheless a fundamental difference between the parties as to the rate of return that should be used to arrive at the discount rate which will determine the appropriate multiplier." 82. Next Lord Hope summarised the evidence of the plaintiff's witnesses as presented to the Royal Court. The Royal Court had declined to adopt the approach of the witnesses. Instead they expressed their conclusion as follows (Judgment 4/2010), at para.199:- "In conclusion, the Court sets the discount rate in the current case by starting with the Lord Chancellor's rate of 2.5%, deducting 0.5% for the difference between UK RPI and Guernsey RPI and deducting a further 1.05% to allow for the reduction in the return on ILGS. Then, rounding to the nearest 0.5%, the Jurats arrive at a figure of 1% as the discount rate to assume in the present case." 83. Lord Hope finally turned to the decision of the Court of Appeal, as follows:- "39. The judgment of the Court was delivered by Sumption JA. He dealt first with the relevance of the Lord Chancellor's rate of return. He said that in his judgment the statutory rate of return fixed by the Lord Chancellor under the Damages Act 1996 was irrelevant in Guernsey. It was certainly not conclusive evidence, and was not even good evidence because of the dramatic decline since 2001 in yields on fixed interest securities issued by first class borrowers. He also rejected the [defendant's] argument that there was a practice of using a discount rate of 2.5% derived from the Lord Chancellor's determination regardless of its appropriateness in current economic and financial circumstances: paras 20-22. 40. Sumption JA then considered the Deputy Bailiff's view that there had, as a matter of law, to be a suitable index of earnings before the discount factor could be adjusted to reflect the difference between price and earnings inflation. He said that this was wrong. It was a question of fact, and if an adjustment could be made which would serve to compensate the respondent more exactly for his losses there was no legal reason why it should not be made: para 32-33. The Deputy Bailiff's direction was also wrong because it was based on a misunderstanding of the function of an index in the calculation of a lump sum. The lump sum was awarded on the footing that investment in

ILGS would achieve an automatic adjustment for future increases in the general level of prices. The question then was whether it was possible to adjust the discount rate to reflect the fact that, on the evidence, the rate of price inflation in Guernsey was not the same as the rate of increase of the UK RPI and that the rate of earnings inflation in Guernsey was even further from the rate of increase of the UK RPI: paras 34-37. He also disagreed with the Jurats that an index was necessary as a matter of fact to enable these adjustments to be made: para 39. 41. Having considered the evidence, Sumption JA said that it seemed to him to constitute strong unchallenged evidence of both the existence of a gap between price and earnings inflation in Guernsey of the order of 2%, and the likelihood that over time it would persist: para 44. The question then was whether the Appeal Court could and should intervene to correct the position. He concluded that it should, for three reasons. First, the Jurats' view that a current index of earnings was the only acceptable kind of evidence was based on a conceptual error which seemed likely to have influenced their thinking. Second, their reasons depended on the uncertainty of future trends for the earnings of carers in Guernsey as opposed to average earnings. But evidence from the United Kingdom suggested that, while the rate of increase was different, it was greater and that any difference would be likely to increase rather than reduce the award. Third, as far as the Jurats intended to discard economic theory, they were overlooking the fact that any analysis of the expected future behaviour of prices and earnings was bound to depend on economic theory, and they had also disregarded evidence which was powerful, consistent and unchallenged on issues on which their own experience was unlikely to be of much assistance: para 46. 42. As for the question whether there should be more than one rate, this seemed to him to be correct in principle in a case where there was a significant difference between the elements representing loss of earnings and care costs: para 48. The correct discount rate to apply was -1.5% for earnings related losses comprising the [plaintiff's] own loss of earnings and the cost of employing his carers. The correct rate for the non-earnings related elements of the future loss was 0.5%: para 49." The Privy Council dismissed the defendant's appeal against the decision of the Court of Appeal. 84. We now revert to Advocate Nicholls' three options. In his skeleton argument Advocate Nicholls relied on the decision of the Royal Court in *State of Qatar v Al Thani*

[1999] JLR 118 , where the Court said (at pp.126-127):- "In our judgment the doctrine of stare decisis as expounded by the English courts does not exist in Jersey. But that conclusion is not as heretical or revolutionary as it might at first blush appear. We have already stated that nearly all legal systems acknowledge the persuasive force of judicial precedent. ... This court is generally bound by the decisions of the Court of Appeal and of course, as it has always been, by the decisions of the Judicial Committee of the Privy Council sitting on appeal from the courts of this jurisdiction. ... The Court is not bound by decisions of the Judicial Committee of the Privy Council sitting on appeal from some other jurisdiction. Authority for that proposition stems not only from the conclusion at which we have arrived having regard to the nature of the doctrine of precedent in Jersey but also, and more succinctly, from the judgment of the Court of Appeal in *Hall v. Att. Gen.* [1996 JLR

129], where Gloster, J. A. stated (... at 148): "The appellant now contends that Kong Cheuk Kwan, as a decision of the Privy Council, is binding upon this court. We reject that submission. The decisions of the Privy Council, in so far as they decide the law of Jersey, are of course binding on all Jersey courts. But a decision of the Privy Council which decides the law of Hong Kong, New Zealand or any other country is not binding. Such decisions are persuasive, but the degree of persuasiveness will depend on the similarity of the point of issue between the law of Jersey and the law of the country from which the appeal is being brought." We would respectfully add that the degree of persuasiveness may also depend upon social and policy considerations particular to this jurisdiction." 85. If the decision of the Privy Council in Helmot had been one of law, we would have seen considerable force in the submission that we should adopt and follow that decision in this Court. But as appears from the passages which we have set out above, that is not the position. The decision of the Court of Appeal of Guernsey, which the Privy Council upheld, was a decision that the Court of first instance should have accepted the evidence of the expert witnesses called by the plaintiff. In short, the decision in Helmot was a decision on the facts of that particular case against the background of the economic circumstances of the bailiwick of Guernsey at the material time. 86. In his final address Advocate Nicholls did not seek to argue that the economic conditions in Jersey were identical to those in Guernsey; as he rightly accepted, he had no evidential basis for any such assertion. He did, however, argue that the economic circumstances of Jersey were more analogous to those of Guernsey than to those of the United Kingdom. He identified in particular that both bailiwicks were important financial centres, enjoyed full employment, had comparable governmental and legal systems and shared a jurisprudence derived from similar systems of customary law. We broadly accept that in economic terms Jersey may well have more in common with Guernsey than with the United Kingdom, but we reject Advocate Nicholls' submission that we should for that reason follow Helmot . Again the difficulty, as we see it, is the absence of any evidence that would justify our reaching in the Jersey context the same result as in Helmot . We would also point out that the evidence upon which the Court of Appeal relied in Helmot is now some five years old and that the intervening period has been one of financial upheaval; we simply do not know whether the same exercise as was undertaken in Helmot would produce the same result if it were to be performed against the backdrop of the current financial climate. For all these reasons we reject Advocate Nicholls' option (b). 87. Similar considerations apply, in our judgment, to Advocate Nicholls' option (c). In the absence of evidence, we have no basis for determining ourselves what the appropriate discount rate should be, whether -1% as suggested by Mr Saint by reference to Helmot as adjusted, or any other number. At best we could do no more than make an educated guess as to the correct figure and that would not, in our view, be an appropriate approach for this Court to adopt. 88. Having rejected options (b) and (c), we are left with option (a). In this regard Advocate Hall drew our attention to the decision of the Jersey Court of Appeal in Channel Islands Knitwear Company Limited v Hotchkiss

[2001] JLR 234 , where (at para.39) the Court applied a discount rate of 3% to the plaintiff's future losses (albeit without any apparent argument) at a time when that was the prevailing rate in England following *Wells v Wells* . We accept that this decision supports her submission that the present practice of the Royal Court as to the discount rate follows that of England. 89. We make clear that we do not adopt option (a) with any particular enthusiasm. As Sumption J. A. commented in *Helmot* (Judgment 31/2010), at para.11:- "The Lord Chancellor's determination was widely criticised at the time as being too high, and as such too favourable to Defendants. Additional substance has been given to these criticisms in recent years as a result of the general decline of yields on gilts. At the time of the Royal Court's judgment in this case, the year-average gross redemption yield on index-linked gilts was 1.28 per cent, approximately half of the figure determined by the Lord Chancellor in 2001." In our judgment, however, it would not be right for the Royal Court to depart from its previous practice of using the discount rate prevailing in England unless and until the issue is revisited in this Court with the benefit of expert evidence. We were informed by Advocate Hall that there were thought to be cases in the pipeline in this Court in which the sums in dispute would justify the calling of expert evidence along the lines of that in *Helmot* , but that is for another day. Accordingly we would in this case have adopted a discount rate of +2.5%, as espoused by Advocate Hall. 90. In our judgment, therefore, the correct multipliers to take from the Ogden Tables would have been as follows (in substitution for those in brackets proposed by Mr Saint):- Table 1: 26.52 (59.63) Table 27: years' futurity - 0.8839 (1.0515) years' futurity - 0.6905 (1.1627) years' futurity - 0.5394 (1.2856) Medical treatment and physiotherapy 91. We take together the first three items under this head, namely the cost of:- (i) ankle arthroscopy and debridement; (ii) ankle replacement; and (iii) revision surgery for ankle replacement. The dispute in relation to these three items was very limited. Advocate Hall did not dispute either the figures for the chances that these surgical procedures might be required by Mr Saint in the future, or the costs figures in respect of the procedures. As indicated in the Counter Schedule, her only point (other than the discount rate), was that the claim assumed that each of the procedures would be conducted privately. But, she contended, there was no evidence that Mr Saint would incur the cost of such private treatment when the surgery was available from Health and Social Services at no cost to him. 92. In our judgment Advocate Hall has made good her objections in respect of these three items, for the following reasons. (i) At para.48 of his second witness statement Mr Saint said this:- "Mr Bowyer has indicated that ... there is a high degree of likelihood that I will need surgery in the future. He has provided a current price indication for that surgery, accommodation and theatre fees. If that happens I will again need to take off work which is unpaid and for the period of recovery." What he did not say in that paragraph (or, indeed, anywhere in his statement) was that he intended to pay for the surgery, accommodation and theatre fees himself. Nor was he asked to elaborate on this part of his statement in examination in chief. (ii) When first asked in cross-examination about these items, his initial reaction was one of surprise that the cost of private treatment had been included in his Schedule. (iii) Mr Saint confirmed in his oral evidence that he had never had private treatment

previously, for instance in relation to his shoulder injury. (iv) He candidly accepted that he could not say definitively that he would have private treatment in the future. (v) To take the third surgical procedure as an example, in respect of which the total discounted cost was calculated as £15,640.58, the chance of Mr Saint requiring this procedure was a mere 2%. His claim was therefore only £312.81. We do not believe that Mr Saint would be prepared to pay the 98% balance of the cost, namely £15,327.77, out of his own pocket for private treatment, even if he were able to do so. We would therefore have rejected these three items of Mr Saint's claim. 93. That brings us to the fourth item under this head, namely the expense of Mr Saint attending on his general practitioner in respect of his ankle injury once a year in the future. Again Advocate Hall did not quarrel with Mr Saint's costs figures (apart from the discount rate). She simply contended in the Counter Schedule that Mr Saint was unlikely to go to his general practitioner unless and until he required further surgery, whereupon he would be referred to hospital; she therefore submitted that a lump sum of £500 would be sufficient in respect of this item. In our judgment, however, it would not be unreasonable to allow Mr Saint the cost of one visit a year to his general practitioner in respect of his ankle, namely £38. Applying the life multiplier of 26.52, we would therefore have awarded Mr Saint £1,007.76 in respect of this item. Loss of earnings 94. The only issue under this head was the discount rate. Applying what we have found to be the correct discount rates of 0.8839 and 0.6905 respectively to the figures claimed by Mr Saint, we would have awarded Mr Saint damages in the sums of £1,218.93 and £622.61 under this head, making a total of £1,841.54. Smith and Manchester award 95. An award under this head is intended to compensate the victim for any handicap on the open labour market which he will suffer as a result of his injury. As Scarman L. J. explained in *Smith v Manchester Corporation* (1974) 17 K. I. R. 1 (at p.6):- "Loss of future earnings or future earning capacity is usually compounded of two elements.... The second element in this type of loss is the weakening of the plaintiff's competitive position in the open labour market: that is to say, should the plaintiff lose her current employment, what are her chances of obtaining comparable employment in the open labour market? The evidence here is plain -- that, in the event (which one hopes will never materialise) of her losing her employment with Manchester Corporation she, with a stiff shoulder and a disabled right arm, is going to have to compete in the domestic labour market with women who are physically fully able. This represents a serious weakening of her competitive position in the one market into which she can go to obtain employment. It is for that reason that it is quite wrong to describe this weakness as a "possible" loss of earning capacity: it is an existing loss: she is already weakened to that extent, though fortunately she is protected for the time being against suffering any financial damage because she does not, at present, have to go into the labour market." 96. In his Schedule of Loss Mr Saint claimed six months' loss of earnings, namely £13,790.40, in respect of this item. At para.12 of his second statement he said as follows:- "Similarly, I remain with the same employer but I do now have concerns about the long term viability of my role, particularly as I am now faced with an unstable right ankle that will inevitably deteriorate with osteoarthritis. If the accident had not occurred I would be far more confident about my long term prospects

with my employer." In his oral evidence Mr Saint elaborated on this evidence. His role did not just involve supervision; he was hands-on at Drain It. If he was no longer able to be so hands-on, his employer might find someone to replace him. 97. Although the Counter Schedule originally accepted a reduced period of three months' loss of earnings, namely £6,895.20, Advocate Hall withdrew this concession in her final address. She submitted that in order for the Court to make an award under this head it must be satisfied that there is a real risk of the victim losing his or her job in the future. But, she argued, that test was not satisfied on the evidence in the present case. In this regard she relied in particular on three matters, namely that there were older employees at Drain It, that Mr Saint was a well-liked and respected employee and that the company had been prepared to find him an administrative position in March 2011, when he was suffering from his shoulder injury. 98. In our view Advocate Hall was correct in her description of Mr Saint as, in effect, a valued employee of Drain It. Had he not been a valued employee, we suspect that Drain It would, one way or another, have dispensed with his services at some stage during his prolonged absences from work between October 2010 and August 2012. That said, we do not accept Advocate Hall's submission that Mr Saint's concerns about his future employment prospects were simply speculative. His right ankle is already undergoing degenerative osteoarthritic changes. As Mr Bowyer explained, he would expect the osteoarthritis in Mr Saint's ankle to get gradually worse, or to undergo a sudden deterioration at some time in the future. In those circumstances it seems to us that Mr Saint does satisfy the test in *Smith v Manchester Corporation*. In our view, however, an award of six months' salary would be excessive; Mr Le Feuvre's original offer of three months loss of salary would be the appropriate figure. We would therefore have awarded Mr Saint £6,895.20 under this head. Future gardener expenses 99. This was the single largest head of damages claimed by Mr Saint. His Schedule valued this head of claim in the sum of £66,785.60, on the basis that a gardener would be required 20 times a year. Again, however, at para.49 of his second statement Mr Saint said that he would only need to employ a gardener "on a monthly basis for the rest of my life". In addition, it seems to us that we should take the cost of each visit as £40 (the figure quoted at para.(A)6 of the Schedule and in para.47 of his second witness statement), not ,56 (the figure quoted at para.(B)4). On that basis this item was, as Advocate Nicholls conceded in his final address, worth only £28,622.40. 100. The Counter Schedule in respect of this item read as follows:- "The Defendant admits that the Plaintiff may have some difficulty in gardening in the future but avers that this difficulty could be overcome by the use of a ride on lawn mower, which would have to be replaced every 5 to 10 years. The cost of such ride on lawn mower is circa £1,500 and bearing in mind the Plaintiff would be unlikely to maintain a garden of that size past the age of 70, and/or is likely to downsize, the Defendant avers that a £4,500 payment should be made in relation to the lawn mower and a further £2,970.24 to allow a gardener to attend 8 hours each year for the Plaintiff's lifetime." 101. Much of what we have already said in paras.71 and 72 above about Mr Saint's claim for past gardener expenses applies here also. In cross-examination Mr Saint said that he and his partner were unlikely to move to another house; they had a lot of plans for the present house and

garden. We accept this evidence and conclude that we would not have reduced Mr Saint's claim on the basis of any intention to downsize. We do, however, accept Advocate Hall's submission that the correct approach to this item would be to allow the cost of a ride-on lawn mower to enable Mr Saint to maintain the lawn and the field. Indeed in his final address Advocate Nicholls accepted that Mr Saint would be assisted in this regard by motorised equipment. On the basis of a cost for such a mower of £1,500 (which Advocate Nicholls did not dispute), plus two replacements, this approach would produce a figure of £4,500. In addition to this cost, we would have been prepared to allow the cost of five visits per year by a gardener to undertake such tasks as cutting the hedges. At a cost of £40 per visit, this would come to a further £200 a year, or £5,304 after applying the multiplier of 26.52. We would therefore have awarded Mr Saint a total of £9,804 in respect of this item. 102. In summary, we would have awarded Mr Saint damages of £19,548.30 under this head of Future Losses, as follows:- (a) Medical treatment and physiotherapy (i) Chance of ankle arthroscopy and debridement £nil (ii) Chance of ankle replacement £nil (iii) Chance of revision surgery for ankle replacement £nil (iv) GP fees £1,007.76 (b) Loss of earnings £1,841.54 (c) Smith and Manchester award £6,895.20 (d) Gardener expenses £9,804.00 Total future losses £19,548.50

- (3) General damages - pain, suffering and loss of amenity 103. The parties were agreed that in terms of the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases Mr Saint's ankle injury fell into the moderate category. This covers:- ", ligamentous tears and the like which give rise to less serious disabilities such as difficulty in walking on uneven ground, difficulty in standing or walking for long periods of time, awkwardness on stairs, irritation from metal plates and residual scarring. There may also be a risk of future osteoarthritis." We concur that this is the correct category. The band of compensation for this category of injury is £10,100 to £19,550. Advocate Nicholls contended that Mr Saint's injury lay at the top end of the band and submitted that the correct damages figure would be £17,500. 104. Advocate Hall argued for a figure at the bottom of the scale, in reliance principally on the report of Mr Bowyer who in December 2012 had seen Mr Saint and recorded as follows:- "There was no swelling around the ankle. There was tenderness anteroomedially at the ankle, but not elsewhere. There was full range of movement in the ankle and subtalar joint. The ankle was stable to stressing, but there was fine crepitus on moving the ankle. One-legged stance was good. One legged heel raise was good. Mr Saint was able to go on the inner and outer borders of his foot without any difficulty." She also drew the Court's attention to two cases reported in Kemp & Kemp: Quantum of Damages , namely McKenzie v Craggy Island Ltd . and Crowley v Punch Taverns , in which the English courts awarded the equivalent of £9,505.66 and £9,075.89 (at today's RPI) respectively. We accept Advocate Hall's submission that the injuries in those two cases were broadly comparable to Mr Saint's injuries but we would have been minded to be slightly more generous to Mr Saint than she suggested. We would have awarded Mr Saint damages under this head of £11,000. Summary 105. It follows that, if we had found for Mr Saint on the issue of liability, we would have awarded him damages as follows:- Past losses £17,013.47 Future

losses £19,548.50 General damages £11,000.00 £47,561.97 In addition, we would have awarded Mr Saint interest calculated in the usual manner. As it is, Mr Saint's claim fails in its entirety. Costs 106. The parties were agreed that any discussion as to costs should await the delivery of this judgment. That said, since we have dismissed Mr Saint's claims altogether, our provisional view is that he must pay the costs of the action on the standard basis, to be taxed if not agreed. We will hear submissions from Counsel if either party wishes us to make any different order. 107. Finally we would express our thanks to both Counsel for their expeditious conduct of this case. Authorities Morley v Reed

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