JUDGMENT : The Hon. Mr. Justice Jack : QBD. 17th January 2006

1. This was a claim against solicitors and counsel for negligence in advising the claimant to settle at too low a value his claim arising from a road accident in which he had suffered serious head injuries. The action was tried over four days between 11 and 14 October 2005. I handed down my judgment in favour of the claimant on 16 December, and I refer to it for the issues to which the action gave rise and my decision. It was agreed that in consequence there should be judgment for the claimant in the sum of £130,000 inclusive of interest. I had held that liability between the defendants should be apportioned as one third to the first defendants, the solicitors, and two thirds to the second defendant, counsel. On 16 December I heard submissions as to costs, and I reserved my judgment.

2. This is an action in which like many reaching trial today the costs have become as important as the claim itself, or more important. The approximate figures with which I was provided show that as at 11 August 2005 the combined costs were £230,000 and as at 16 December they were estimated at £435,000. The judgment was for £130,000. It is fair to state that the sum claimed was very much larger.

A. Costs as between the claimant and the defendants

3. It was submitted by Mr Simon Dyer for the claimant that the claimant as the successful party should have his costs save that the defendants should not have to pay one half of the costs of obtaining reports from Dr Herbert, an occupational physician. That was accepted by Mr Julian Picton on behalf of the first defendants save that he submitted that 3/4s of the costs of Dr Herbert's reports should be excluded. Mr Graeme McPherson submitted for the second defendant that the defendants should be liable for no more than 80% of the claimant's costs on the ground that in addition to the matter of Dr Herbert's reports the claimant had failed on a number of distinct issues.

4. The matters relied on by Mr McPherson were:

   (a) **Dr Herbert's reports** The claimant obtained a report and an addendum report from Dr Herbert. Permission for such an expert was refused at the original case management conference. A further application was abandoned the door of the court prior to the pre-trial review. Although Dr Herbert's reports were not used at the trial, the documentary material collected by him was included in the trial papers, and some use was made of it.

   (b) **The care evidence** The claimant's case was that he should be awarded a substantial sum, in excess of £600,000, to cover his future care, being the cost of case management, occupational therapy and support workers. Care experts prepared reports and were called to give evidence on behalf of the claimant, Mrs Sheard, and the defendants, Mrs Gough. They were the only experts to be heard, it having been sensibly agreed that I should determine the other issues arising on the expert evidence on the basis of the reports and joint statements, an agreement which shortened the trial considerably. The claimant's advisers had suggested that the evidence of Mrs Sheard and Mrs Gough should be dealt with on the same basis, but this was rejected by the defendants. Given the wide disagreement between Mrs Sheard and Mrs Gough, I think that in order to decide between them it was necessary for them to be called. I held that damages should be awarded on the basis of some involvement of a case manager and some additional care, that care being provided initially through the Hickman family: paragraphs (j), (k) and (l) of the appendix to my judgment. This came to about £35,000 before discounting for the risk of losing against the Motor Insurers Bureau and contributory negligence. I stated in my judgment that, had it been necessary to do so – which it was not, I would have relied on the evidence of Mrs Gough and not on that of Mrs Sheard.

   (c) **The EEC Directive** It had been alleged on behalf of the claimant that the defendants, particularly the second defendant, should have raised in the original action the issue which was much later considered by the House of Lords in ***White v White*** [2001] 1 WLR 481 arising on the terms of the Second EEC Motor Insurance Directive, 84/5/EEC. The allegation was abandoned by Mr Dyer in his closing submissions. It had required some research by counsel but occupied little time at the trial.

   (d) **The prospects of success against the Motor Insurers Bureau: 60/40 or 50/50** I held in favour of the defendants that the claimant had a 50/50 chance of success against the MIB rather than a 60/40 chance. The issue took up little time and did not involve any detailed examination of the points which could have arisen on the evidence had that issue been tried.

(e) **'Peripheral' allegations** This refers to a number of allegations of negligence including that the defendants put unfair pressure on the claimant to accept the offer. These allegations failed. I held that negligence was established because the defendants failed to take into account in advising the claimant the real possibility that he would be entitled to be compensated for loss of earnings and care on a lifetime basis. That conclusion involved an examination of the full circumstances in which the advice was given: the 'peripheral' allegations did not much extend the process.

5. Mr McPherson of course accepted the general rule that a successful party is entitled to his costs - Part 44.3(2)(a). He relied on Part 44.3(4)(b) which requires the court to have regard among other circumstances to whether a party has succeeded on part of his case. I should also have in mind Part 44.3(5)(b) which refers to whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue, and Part 44.3(5)(d) which refers to whether a successful claimant has exaggerated his claim.

6. Mr Dyer for the claimant made two submissions in answer. He submitted that, if Dr Herbert was put on one side, the issues referred to had not lengthened the trial or otherwise added to the costs to such an extent that it should be reflected in costs. He referred me to ***Fleming v Chief Constable of Sussex Police Force*** [2004] EWCA Civ 643 as an example of case where a failure on a distinct issue had been held not to displace the prima facie rule that costs should follow the event. Secondly, he referred to the refusal of the second defendant to participate in mediation or to negotiate towards a settlement. He submitted that this was conduct which I should take into account under Part 44.3(4) and (5) and so should refuse to make any deduction from the claimant's entitlement to costs which I might otherwise have thought appropriate.

7. Dr Herbert apart, and with the possible further exception of the costs incurred in connection with the care experts, I have no hesitation in deciding that the matters raised do not merit reflection in the order for costs. I do not think that those matters added sufficiently to the length of the trial or to the burden of costs to merit that. As to care, I consider that it was reasonable for the claimant to pursue his largely unsuccessful claim in connection with care, and I do not consider the claim should be described as exaggerated. I also accept that a claim which fails but which is not unreasonably pursued or exaggerated can nonetheless be reflected in costs if that is otherwise appropriate. I consider that it will meet the circumstances here to order that the claimant shall pay the defendants their costs of Mrs Gough's reports and that the costs of Mrs Sheard's reports shall not be included in the costs to be paid by the defendants to the claimant. The same order should be made in respect of their joint report and meeting and any costs associated with the joint report and meeting. I do not think it appropriate to make a special order in respect of the costs incurred in connection with care at the trial: that would bear more heavily on the claimant than the situation merits. It will also be ordered that the claimant shall not recover from the defendants three quarters of his costs of Dr Herbert's reports.

8. This conclusion in respect of the care costs gives no weight to Mr Dyer's submission that, Dr Herbert apart, the claimant should have all his costs against the second defendant by reason of the second defendant's refusal to negotiate or enter into mediation. The conduct of the second defendant was the subject of extensive submissions by Mr Picton and Mr McPherson as to the burden of costs between their clients, to which I will come. It was dealt with but briefly by Mr Dyer. For the reasons I will set out I do not consider that the conduct of the second defendant, or, in reality, that of his insurers, in relation to mediation and negotiation was unreasonable. It should not count against the second defendants in relation to costs.

B. Costs between the defendants

9. There were three issues:
(a) liability as between the defendants for the claimant's costs;
(b) liability as between the defendants for the first defendants' costs;
(c) liability for the costs of the contribution proceedings between the defendants.

10. I will take the last first because it was very largely agreed. It was agreed that as from 28 January 2005 the second defendant should pay the first defendants' costs of the contribution proceedings on an indemnity basis. That was because on 7 January 2005 the first defendants made a Part 36 offer of a one

third/ two thirds apportionment. Mr McPherson proposed that there should be no order in respect of the minimal costs incurred in the contribution proceedings prior to that date: Mr Picton did not dissent.

11. As to the liability for the claimant's costs, it was agreed between the defendants that the starting point was that as between them liability for the claimant's costs should be apportioned as liability for damages was apportioned, namely one third to the first defendants and two thirds to the second defendant. However Mr Picton submitted for the first defendants that the second defendant should pay all the claimant's costs after 28 July 2005, alternatively after 10 August 2005, by reason of the second defendant's conduct in refusing to negotiate and to enter into mediation. This, he submitted, was conduct to which I should have regard under Part 44.3(4)(a), with the outcome I have stated. Mr McPherson accepted that it was conduct to which I might have regard but submitted that the conduct of the second defendant had been wholly reasonable. He also submitted that the first defendants could have protected their costs position in the event of an adverse outcome but had failed to do so.

12. For the purpose of this issue I was provided with a selection of correspondence and attendance notes of 81 pages. It begins with an attendance note made by Beachcroft Wansbrough, 'BW', acting for the first defendants, of a telephone conversation with Richards Butler, 'RB', acting for the second defendant, on 26 November 2004. In this conversation the differences of view as to the strength of the claim were discussed, namely that BW thought the defendants were in difficulties on liability because there had been no advice to the claimant as to his damages if rehabilitation did not succeed, and RB thought that there had been a fair presentation of the claimant's prospects as to damages. It was BW's view that the action should be settled on economic terms, and that the quantum of the claim could be attacked successfully. Settlement of the action was also raised in a conversation on 11 February 2005, when BW suggested to RB that mediation would be appropriate. Mediation was discussed in a further conversation between BW and RB on 14 March. This followed it being raised at a case management conference by the master, but I do not know the terms in which it was raised. No order had been made by the master. (As to typical content of such an order, see ***Halsey v Milton Keynes General NHS Trust*** [2004] EWCA Civ 576, at paragraph 32.) BW wanted to settle the case before too much additional expense was incurred, and thought mediation the best way. RB agreed to take instructions. On 24 March BW again urged mediation on RB. On 8 April the Roland Partnership, 'RP', acting for the claimant, confirmed to BW that they were happy to mediate. On 14 April RB wrote to BW saying that mediation was premature as the experts had not yet met: following that they would be deciding their approach to settlement and mediation. On 15 April BW wrote to RB pressing them to make an immediate decision. On 20 April RB replied saying there would be ample time for mediation, if appropriate, before a trial: their client had always believed the claim to be of doubtful merit. On 1 June BW wrote to RB urging mediation referring to the costs consequences of refusing. On 14 June RB replied that they were not prepared to consider mediation before the experts' joint statements, and that the claim faced considerable difficulties and was over-inflated.

13. On 7 July 2005 a Part 36 offer was made on behalf of the claimant to settle for £250,000. On that day BW discussed the offer with RB saying that they would probably want to accept it because the costs would outweigh any savings that could be made. On 21 July RB wrote to BW saying that after a thorough review of the case they considered that the claimant was unlikely to establish liability against either defendant; that on the basis liability was established the likely value of the claim was between £62,000 and £115,000 tending to the lower end of that range, and that they were not minded to participate in mediation. Their reason for the latter was that unless the defendants were prepared to make an offer in line with the claimant's expectations, the prospects of a successful mediation would be negligible, so they were not prepared to undertake the additional costs. On 22 July there was a discussion between BW and RB. BW said that they thought that RB had fundamentally misjudged the merits of the claim. They thought the claimant would recover about £250,000.

14. On 28 July 2005 BW wrote to RB restating their position, urging acceptance of the offer to settle at £250,000 and agreeing to pay one third of the liability for damages and costs. They again urged mediation. On 29 July the offer expired. On that day BW wrote to RP saying they would like to accept the offer but were not prepared to do so unilaterally: they would pay one third provided the second

defendant agreed to make no claims against them. RB wrote saying they were rejecting the offer. On 1 August RP and BW again discussed settlement.

15. On 10 August 2005 RP wrote to BW saying 'if it would assist our client would be interested in a settlement that concluded all issues in the case and left him with £150,000 after payment of his costs.' In a conversation on 11 August RP stated that this was an offer made to both defendants, and the claimant would not settle with one unilaterally but wanted to see an end to the entire case. So, he would not settle with the first defendants alone either on a one third basis or with them on a 100% basis. The latter would have left the claimant open to involvement in the contribution proceedings between the defendants. On 12 August BW wrote to RB with a copy of RP's letter saying that they were in no doubt the offer should be accepted. On 22 August RB wrote to BW saying that they were not prepared to settle at that amount, and that if BW wanted to accept the offer they were free to do so (that is to say, the first defendants could settle with the claimant and then pursue the second defendant for a contribution).

16. On 13 September 2005 RP sent a further Part 36 offer in the sum of £250,000. This was because there had been a dispute about the terms of the offer made on 7 July. On 13 September RP confirmed to BW that the claimant would still settle with both defendants for £150,000 plus costs. On 16 September RB wrote to BW saying that it appeared that the matter must proceed to trial but asking whether contribution might be agreed between them. On 20 September RP wrote saying that the £150,000 offer was only open until 23 September. On 22 September RB offered to agree contribution at 57/43, 57% being the second defendant's share. On 29 September BW offered 60/40 provided the second defendant agreed to accept the claimant's now withdrawn offer of £150,000 and to pay all parties' costs after 28 July. RB replied the same day saying that they would accept 60/40 but the claim itself must go to trial. This was refused by BW the next day, BW saying that they would only agree 60/40 if the second defendant agreed to settle the claim. On that day in the course of a telephone conversation RB told BW that, if the claimant offered to settle for £50,000 plus costs they would be interested. RB also said that, if the first defendants paid £83,000 (one third of the offer of £250,000), the second defendant might, for example, top it up to £110,000. In further discussions between BW and RB on 5 October it became clear there would be no settlement. The trial began on 11 October.

17. I was provided with the following figures as to costs:

	As at 12 August	Estimated costs to date
Claimant	£100,000	£170,000
First defendants	30/40,000	75,000
Second defendants	100,000	190,000
Total	say £230,000	£435,000

These figures are approximate and have not been subject to assessment. On the basis of them the increase in costs after 12 August was £205,000. The claimant offered to accept £150,000. He was awarded £130,000. If the defendants had settled at £150,000 they would have paid £20,000 more than the award, but on the basis of these figures it would have saved £205,000 in costs.

18. In his written submissions on costs Mr Picton relied on the second defendant's refusal to agree to mediation and to negotiate. In his closing oral submissions he emphasised the refusal to see what could be achieved by negotiation. He submitted that the second defendant's conduct was unreasonable. Mr McPherson stated that the second defendant had been justified in refusing the offer to settle for £150,000, because the claimant had only recovered £130,000. Mr Picton rejoined that this ignored the costs that had been expended to achieve that result. This last argument is one to be watched carefully because it cannot be right that to avoid being vulnerable on costs a defendant should always be prepared to pay more than a claim is worth if the costs saving justifies it: that would enable claimants to put undue pressure on a defendant to settle at a higher figure than the claim merits.

19. Having previously offered to settle for £250,000, on 10 August the claimant offered to settle for £150,000. That is a substantial reduction, which is consistent with a more pessimistic view on liability or a more realistic approach to quantum. The figure could have been justified on the basis, for

example, of a 60% chance on liability and £250,000 for quantum. It is unlikely to have been set in stone. I consider that the strong probability is that if there had been a negotiation the claim could have been settled for a figure not far from the judgment sum. The first defendants were taking a commercial view and so it is very likely that to achieve this they would have been prepared to agree to carry a share of 43% as offered by RB, that being only a small step from the £40,000 they were prepared to consider. So the strong probability is that a settlement could have been achieved close to the £130,000 actually awarded. The reason why that did not take place is that the second defendant would not negotiate. Mediation could have achieved a similar result. In each case success would have depended upon the second defendant being prepared to make an appropriate contribution.

20. I was not referred to any case where a refusal to negotiate has been considered as a ground for making an award of costs which would not otherwise have been made. In ***Halsey v Milton Keynes NHS Trust*** [2004] EWCA Civ 576 the Court of Appeal considered and drew together the principles in relation to a refusal to agree on mediation. The main context of the court's consideration was where a party which is unsuccessful at trial asks that the usual order for costs should not be made because the successful party refused to mediate. In the second of the two appeals heard together by the court, *Steel v Joy*, the court had to consider the position in a three party action as between two defendants between whom a causation issue arose. The defendant who was successful on the issue had refused mediation and was held to have done so reasonably, and it was held that mediation would have had no real chance of success. That was also the outcome of the appeal in *Halsey* itself.

21. The principles which I extract from the leading judgment of Dyson LJ in ***Halsey*** are these:
    (a) A party cannot be ordered to submit to mediation as that would be contrary to Article 6 of the European Convention on Human Rights – paragraph 9.
    (b) The burden is on the unsuccessful party to show why the general rule of costs following the event should not apply, and it must be shown that the successful party acted unreasonably in refusing to agree to mediation – paragraph 13. It follows that, where that is shown, the court may make an order as to costs which reflects that refusal.
    (c) A party's reasonable belief that he has a strong case is relevant to the reasonableness of his refusal, for otherwise the fear of cost sanctions may be used to extract unmerited settlements – paragraph 18.
    (d) Where a case is evenly balanced – which is how I understand the judgment's reference to border-line cases, a party's belief that he would win should be given little or no weight in considering whether a refusal was reasonable: but his belief must be unreasonable – paragraph 19.
    (e) The cost of mediation is a relevant factor in considering the reasonableness of a refusal – paragraph 21.
    (f) Whether the mediation had a reasonable prospect of success is relevant to the reasonableness of a refusal to agree to mediation, but not determinative – paragraph 25.
    (g) In considering whether the refusal to agree to mediation was unreasonable it is for the unsuccessful party to show that there was a reasonable prospect that the mediation would have been successful – paragraph 28.
    (h) Where a party refuses to take part in mediation despite encouragement from the court to do so, that is a factor to be taken into account in deciding whether the refusal was unreasonable – paragraph 29.
    (i) Public bodies are not in a special position – paragraph 34.

22. There are two further points which arise from the judgment. It is not an answer that the unsuccessful party could have protected itself by a Part 36 offer, or a payment into court. That finds no place in the judgment and it certainly would have done had it been relevant. For the context of the judgment is that where an unsuccessful party is trying to avoid the payment of costs; and a party can in all ordinary circumstances protect itself by a Part 36 offer or a payment into court. Second, the court did not refer to the potential saving of costs in comparison with the amount in issue between the parties as being something that was relevant to the reasonableness of a refusal to agree to mediation. I accept that it can be a factor to be taken into account, but for the reason I have stated it must be watched carefully.

23. Although I was not referred to them at the hearing I have looked at the three decisions referred to in ***Halsey***. I found no assistance in ***Cowl v Plymouth City Council*** [2001] EWCA Civ 1935. In ***Dunnett v Railtrack*** [2002] EWCA Civ 303, [2002] 1 WLR 2434 the claimant who had failed at first instance was advised to explore mediation by the Lord Justice granting permission. The defendants refused to do so. The appeal was dismissed, but the court deprived the defendants of their costs, making no order. In giving the leading judgment Brooke LJ drew the attention of lawyers 'to the possibility that, if they turn down out of hand the chance of alternative dispute resolution when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequences' – paragraph 15 of the judgment. This is the only case I have found in which a refusal to agree to mediation was reflected in costs. That is not to say that there may not been a number of such decisions made at the conclusion of trials. In ***Hurst v Leeming*** [2002] EWHC 1051 it was held that the defendant was fully justified in refusing mediation of a claim which had no real prospect of success.

24. Mediation is a comparatively recent introduction in English civil procedure. It involves the services of a skilled mediator. The process may take up time and can be expensive. In cases of difficulty, by reason of the ability of a mediator to oil the wheels of settlement in various ways, it is more likely to be effective than the simpler process of negotiation by discussion and offer and counter-offer. I suppose that the main task of a mediator is commonly to lower the proper expectations of the parties to a point where agreement is possible. As the process of settlement by negotiation is less time-consuming and cheaper than mediation, it may be suggested that parties should have the less reluctance to enter into it.

25. This is not a case where I am being asked to deprive a successful party of his costs because of his conduct in relation to settlement and mediation. I am being asked to order that the second defendant should pay all the claimant's costs after a date including what would otherwise be the first defendants' share of those costs, because the first defendants were willing to take a course which would have achieved a settlement and avoided those costs, and the second defendant would not. Put more specifically, the first defendants say that the costs after 28 July 2005 were incurred by reason of the unreasonable attitude of the second defendant's insurers and that they should therefore pay them. It is a case where the costs consequences for the first defendants have been very serious as the figures which I have set out show.

26. In my judgment the main issue is whether the conduct of the second defendant was unreasonable. That is the test which emerges from *Halsey. A*lthough the situation I have to consider is different from that in *Halsey* in that a refusal to negotiate is also involved and in that the issue here arises between defendants in the manner I have stated, I consider that the same test must be applicable. It is for the first defendant to satisfy me that it was unreasonable. An important aspect is whether it is demonstrated that the second defendant's view of his prospects was an unreasonable one.

27. I must bear in mind the difficulty I face as the judge who reached the decisions in the case on liability and quantum, in now deciding whether the second defendant's position was a reasonable one.

28. In RB's letter to BW of 21 July 2005 RB stated that, on the basis that liability was established, they valued the claim at between £62,000 and £115,000, and at the lower end of that range. If one takes a figure of £80,000 and discounts that by, as an example, a half to take account of the claim failing, that would value the claim at £40,000. On 30 September RB told BW that if the claimant offered to settle at £50,000 plus costs, they would be interested. This gives an approximate indication of the thinking on the second defendant's side. If one takes the judgment figure of £130,000 and again discounts it by, for example, a half to take account of the risk of the claim failing, one gets £65,000. Against these figures the claimant had offered to accept first £250,000 and then £150,000, the latter being three times what the second defendant (or his insurers) was prepared to consider.

29. Was the second defendant's estimation of the strength of the claimant's case unreasonable? It is easy now to say that it was somewhat optimistic. It should be remembered that it was a view which had been formed after a review of the case by experienced solicitors and counsel. I do not think that in all the circumstances it can be described as unreasonable.

30. Was it unreasonable in the light of that estimation to refuse mediation and to refuse to see what could be achieved by negotiation? It is apparent that the second defendant's insurers were not prepared to take a 'commercial' view like the first defendants: they were not prepared to pay more than they thought the claim was worth because, if costs were taken into account, it would save them money. I consider that this was a legitimate stance because, as I have stated, otherwise the threat of a costs consequence can be used to extract more than a claim is worth. Given the difference between the claimant and the second defendant as to the value of the claim, I do not consider that it is demonstrated that the second defendant's position as to mediation and negotiation was unreasonable.

31. It follows that the submission that the second defendant should pay the claimant's costs after 28 July 2005 fails.

32. Mr Picton submitted that by reason of the same grounds the second defendant should pay the first defendants' costs after 28 July 2005. That must also fail.

33. I nonetheless have some sympathy with the position in which the first defendants found themselves. For if the second defendant had had a similar attitude to theirs, the action would have been settled and a considerable saving in costs made. If the first defendants had accepted the claimant's offer of £250,000, they could then have pursued the second defendant for a contribution. They would have had to establish the second defendant's negligence. It would have been argued against them that in any event they had paid too much. They would have had to call the claimant and members of his family. The claimant would have been a reluctant witness: he still suffers from the accident. The position would have been the same if they had negotiated a settlement at a somewhat lower figure. The saving in costs which they would have hoped to make as a result of the settlement would be much reduced by the need to pursue the contribution proceedings. The much lower offer of £150,000 was made on the basis that if accepted it would be a settlement with both defendants: the claimant was not prepared to settle with one only and wanted to see an end to the entire case – he did not want to be dragged into the contribution proceedings. So without the participation of the second defendant the first defendants could not take advantage of it. They could have protected their position by paying £150,000 into court. That would have put considerable pressure on the claimant. If it was accepted, it would have left them with the same problems as a settlement at £250,000 but £100,000 better off.

Simon Dyer (instructed by The Roland Partnership) for the Claimant
Julian Picton (instructed by Beachroft Wansbroughs) for the First Defendant
Graeme McPherson (instructed by Richards Butler) for the Second Defendant