LORD JUSTICES RIX, BROOKE and KEENE : CA on appeal from the QBD (Bristol District Registry)

1. **LORD JUSTICE BROOKE**: I will invite Rix LJ to give the first judgment. 31st October 2002.

2. **LORD JUSTICE RIX:** This is an appeal by the defendant, Alison Jones, trading as Jones Motors, from a judgment of Mr Recorder Tackaberry QC (sitting as a Judge of the High Court at Bristol) on 5th December 2000, when he directed that judgment be entered for the claimant, Matthew Neal, in this personal injuries action for £259,705.21, plus interest of £7,494.92. The claim arose out of an accident on 5th July 1997, when Mr Neal was riding a Harley Davidson motorcycle along Pontoynon Road, Abercynon, in Mid Glamorgan. A bus owned by the defendant turned right into his path. There has never been any issue as to liability.

3. Mr Neal was nearly 36 at the time of the accident. The judge found that he had become involved with motorcycles when he was 16, and two years later, after appropriate training, he got a job concerned with motorcycle engineering and reconditioning. Although he became head of his department, he left that job in 1983 in order to start his own business, which he called Matt's Engineering. He was living in Surrey at that time. His business specialised in the repair, reconditioning and upgrading of Harley Davidson and Meridian Triumph motorcycles. There was only one other such business in this country. The judge found it enjoyed a reputation far beyond the United Kingdom.

4. In 1985 Mr Neal sustained a fracture to his right tibia in an accident which was entirely his fault. Unhappily, the fractured bones did not unite properly, and following an operation two years later he was left with a right leg which was shorter than his left leg, with the result that his right shoe had to be built up in order to compensate.

5. In 1986 he started living with Miss Janette De'Tedstone, who plays an important part in this history. She had two young children and he had a small son. At that time Miss De'Tedstone was running her own catering business, but she sold this business for £23,000 in 1989 when she took a part-time job. She also undertook an apprenticeship in metal finishing at about this time.

6. The couple then decided to invest the proceeds of the catering business in buying a workshop for Mr Neal's business. That workshop they found in Wales, to which in the following year they moved. Each of them had members of their family there and prices were cheaper there. The workshop they bought in Abercynon and they established a new home there in a converted school-house with the help of mortgages on the workshop, their new home and also Miss De'Tedstone's home in Surrey. The judge found any early profits they made went on repairing or upgrading one or other of these buildings. Miss De'Tedstone estimated that she spent £32,000 in this way. She eventually sold her home in Surrey, which realised another £28,000, which went for investment in the workshop.

7. Although the judge found that Miss De'Tedstone had a tendency to exaggerate, he accepted her evidence about Mr Neal's standing in his specialist field. She said he created motorcycles as pieces of art. She spoke of an exhibition in the Barbican Art Gallery and how he had supplied motorcycles for movies. She said Matt's name was well known at performance racing events.

8. The judge found that in 1997 there were two elements in the firm's business. Mr Neal ran the engineering side, involving work on the motorcycles, and Miss De'Tedstone ran the retail side, with a very good stock of parts. He also found that when Mr Neal suffered his accident in July 1997, they were well advanced in their plans to incorporate an MOT testing station in their business. They had delayed the implementation of these plans because they wished to have the benefit of a good deal on the purchase of the equipment they needed. The judge found that this side of the business would have been a success.

9. The annual volume of sales in the business had increased in value from some £38,000 in 1994 to nearly £80,000 in 1997. One of the problems the judge had to resolve arose from the fact that the average post-tax profit for the three years immediately prior to the accident was, as was subsequently agreed by the accounting experts in the case, only a little over £3,000. It was at this stage of the development of the business that Mr Neal was hit by the defendant's bus. He sustained multiple injuries in the accident. His physical injuries included a dislocated right hip, a fracture to the acetabulum, fractures of the right tibia

and fibula, a fracture of a right rib, multiple scarring over his lower limbs, damage to his teeth, and a laceration over the jawline. He was concussed and unconscious for two hours. The judge found that he suffered 48 hours pre-traumatic amnesia and two weeks post-traumatic amnesia. He suffered a ligamentous and muscular strain involving his cervical and lumbosacral spine. He also suffered memory loss, a weakening of his eyesight, a reduced concentration span and increased irritability. In years to come there would be a greater risk of osteoarthritis.

10. Although there were significant disputes in relation to different aspects of the medical evidence, the judge resolved most of them in favour of Mr Neal. He was impressed by Mr Neal and Miss De'Tedstone as witnesses of truth. In this respect he accepted the evidence of Mr Campbell, a consultant neurosurgeon giving evidence for Mr Neal, in preference to the conflicting evidence of Dr Roberts, a consultant neurologist instructed for Miss Jones. Mr Campbell had found that Mr Neal's memory and concentration were significantly impaired. His handwriting had deteriorated, as had his mathematical abilities, and Mr Campbell was very pessimistic about his ability to continue to hold down a job, particularly in motor engineering. He concluded that Mr Neal would have to take Prozac for the rest of his life. He thought his walking was becoming worse. He was easily distracted and had an elevated risk of epilepsy. So far as his physical injuries were concerned, the judge found that although there was a 75 per cent chance of a hip replacement, this was not likely within the next 15 years. As to the tibia, the judge found that this second fracture had caused further deformity of the tibia and the nail from the first fracture in the form of re-curvation. A small increase in leg lift discrepancy required an additional shoe raise. There would be some increase in ankle stiffness, and he was likely to get osteoarthritis in his ankles, which would probably be equally attributable to each accident.

11. So far as Mr Neal's financial losses are concerned, I will only set out the judge's findings on the issues which are relevant on this appeal. The elements of the award which are under challenge are (1) the award of £22,000 for past loss of earnings; (2) the award of £150,000 for future loss of earnings; (3) the award of £65,000 for general damages.

12. When, after a detention in hospital for 55 days following the accident, Mr Neal returned home, he did so at first on crutches and for a while he was confined to the house. When, however, he was fit enough to help with the business, the judge found that he could no longer safely ride motorcycles because the lack of movement in his ankle and the size of the build-up on his right shoe prevented him from operating brake or gear lever properly. He was also unstable on his right leg, which meant that he was unable to wheel machines about with safety. The judge accepted the accuracy of his statement that:
"As well as seriously impairing my ability to work (I am unable to test drive to diagnose faults, a skill which I had fine tuned over 20 years and one which does not communicate easily from other people with less experience), my entire social life has been torn apart. For me motorcycling was a way of life, not just a form of transport. I can no longer lift or move heavy objects around the workshop without assistance."

The judge also found he could not use right-leg kick starts on motorcycles.

13. There was no formal agreement between Mr Neal and Miss De'Tedstone about the ownership of the business. As I have said, it was founded by Mr Neal as its sole owner in 1983, and the judge said that Mr Neal and Miss De'Tedstone still saw Mr Neal as the owner and the man in charge of the business at the time of the accident. He found, however, that Miss De'Tedstone was a competent businesswoman and that she had made a substantial contribution to the business quite apart from her very considerable investment of capital. The building in which the business was housed was jointly owned.

14. In 1998 the Department of Social Security suggested that Mr Neal's financial problems might be alleviated if he obtained employment from Remploy. This would not be possible if he remained the proprietor of the business. The scheme was therefore devised and duly implemented in September 1998, whereby Mr Neal transferred the business to Miss De'Tedstone and Remploy provided Mr Neal's services to the business. Remploy paid him at a rate which has been estimated at some £10,000 per year, including overtime (that is to say any hours worked in excess of the 28 hours agreed with Remploy). Remploy recovered from the firm 65 per cent of the basic wage represented by the 28 hours, together with the full cost of overtime payments.

15. Unhappily, the relationship between Mr Neal and Miss De'Tedstone deteriorated. Although the date at which Miss De'Tedstone moved out of the family home into a separate home is not known exactly, it had occurred by December 1999, the date of Mr Neal's witness statement in which he refers to that as having happened. By June 2000 relations within the business were sufficiently bad that Miss De'Tedstone purported to dismiss him. This brought the flow of money from Remploy to an end but does not seem to have affected what went on on the ground, because Mr Neal took no notice of his dismissal. He continued to go to the workshop, to do such work as he could, and took £200 per week out of the till with Miss De'Tedstone's knowledge and acquiescence. She took no effective steps to prevent this.

16. The judge found that at the time of the trial there was still a very considerable reservoir of affection between the two, despite the breakdown of their relationship and the fact of Miss De'Tedstone's move to another house. Mr Neal's personality change was at the heart of their difficulties. It gave rise to anger on his part and arguments both at home and at work, and he also treated her on occasions with violence.

17. In these circumstances, the judge felt he had to decide issues relating to the ownership of the business. Mr Neal had told the judge:
"Prior to the accident, I owned Matt's Engineering with my partner, Jan Tedstone... I was responsible for VAT and income tax. Jan received wages of approximately £60 per week and I took drawings out of the business."

And then later:
"...In all, Jan contributed some £50,000 over an eight year period into the business. Between us we owned everything relating to the business."

18. The judge also found that the business bank account was in the names of both and the firm's cheques named the drawer as "*Matt's Engineering and Custom Services T/A [i.e. trading as] Mr Neal and Miss J Tedstone*". In these circumstances, the defendant unsurprisingly argued that the business, as distinct from the property it occupied, was a partnership. That property, as it was, was by common concession jointly owned. Mr Neal contended that the business had been wholly his until he transferred it to Miss De'Tedstone in September 1998. The judge, after considerable reflection, accepted Mr Neal's contention and found that Miss De'Tedstone did not have a legal share in the business at the time of the accident. He reached this conclusion on two main grounds. First, it was clear to him that Miss De'Tedstone saw Mr Neal as very much the head and heart of the firm. He had founded it; it was his skills that had brought it its reputation; and it was his name which would be recognised by the aficionados of these motorcycles. Secondly, he could not see a point of time when there was an event which suggested the occurrence of a change in ownership. While the infusion of capital might have led to such a change, there was nothing, he said, of substance to suggest it had in fact done so. The judge felt that the terminology used to describe the firm was no more than a convenient shorthand or recognition of the fact that Miss De'Tedstone unquestionably had an executive role in the business.

19. It was against the background of this finding and his finding that if the MOT extension had gone ahead it would have been successful that the judge turned to consider Mr Neal's claim for loss of earnings. I have already referred to the low figure of only just over £3,000 for the average net profit of the business for the three years leading up to the accident. Based on information given by Mr Neal, his accountancy expert nevertheless calculated much larger figures for the profits to be anticipated both in the period of 15 months down to the transfer of the business in September 1998 and for the two following years down to September 2000. I will refer to those three periods for convenience as the 1998, 1999 and 2000 year periods.

20. The judge said that the defendant's expert accountant, who categorised the bookkeeping as poor, had emphasised that there was no evidence of large amounts of cash being taken out of the business. Apart from Miss De'Tedstone's injections of capital, neither expert could explain the contrast between the low profit and the comfortable lifestyle the couple enjoyed. The defendant's expert suggested that they were market traders, whose lifestyle always appeared to be in advance of the profits generated. That said, however, the accounts for the years ending with the period up to September 1998 are explicit about what are described as "drawings", presumably from the capital injections referred to in

those accounts, which depleted that capital. These drawings presumably contributed to the lifestyle about which the judge spoke.

21. The judge cited a summary of the judgment of this court in **Cornhill v Green** (Court of Appeal transcript 20th March 1998). He drew from it the proposition that in a case where the evidence was somewhat unsatisfactory and incomplete, "one must do the best one can." It is clear that he was influenced by the application in that case of an earlier judgment in **Foster v Tyne and Wear County Council** [1986] 1 All ER 567, 571, to the effect that there was no real distinction between loss of future earnings and loss of earning capacity, and that where the evidence precluded mathematical accuracy the court had perforce to make the best estimate it could. He considered that in such a case multipliers and multiplicands would be an essential part of the process of estimating damages.

22. The judge said that he had no doubt at all that the business would have been kept going. He remained at a loss to understand how the family supported itself so comfortably and extensively on such a small profits base, even allowing for Miss De'Tedstone's injections of capital, but there was no suggestion of any other source of income. The fact it had been going on for so long with such agreeable results, combined with the determination of both Mr Neal and Miss De'Tedstone, seemed to him to lead inevitably to the conclusion that it would have continued, and indeed prospered, with increasing sales especially from the introduction of the MOT station. The judge also found that if the business had failed, Mr Neal would, before the accident, have been able to obtain well-paid employment as a very skilled engineer, although the likelihood was that this would only have been until he had found another business made for his skills.

23. There was evidence before the judge of the various rates of remuneration available in such employment. The judge referred to that evidence as being helpful. It showed that in 1999 the most highly skilled of motor engineers such as Mr Neal may be presumed on the evidence to have been could command a gross employed income of upwards of £20,000 per year.

24. The judge rejected a contention that Mr Neal had no residual earning capacity. He was managing to work in the business, albeit in a much more limited way than before, and it seemed to the judge unlikely in the extreme, given his ability and drive, that he would embrace a life of retirement. He felt that even if the business had failed, there must be some opportunity on the open market for some work. The judge was strongly influenced in making this finding about Mr Neal's persistence and perseverance by the evidence he had received about Mr Neal's reaction to the 1985 accident.

25. After making these findings, and reviewing the evidence of both of the accountants, the judge thought that a multiplicand of £10,000 for loss of future earnings from September 2000 was appropriate. He considered the appropriate multiplier to be 15. So far as past earnings were concerned, he dealt with the matter very briefly, assessing them at £7,000 for the first period of some 15 months down to 20th September 1998, and £15,000 for the following two years. He said that he had taken the earnings from Remploy into account in assessing the latter figure. He added that in assessing the loss of future earnings at £150,000, he had not taken Remploy earnings into account because he did not think that such an arrangement had any prospect for the future. It had in fact already been brought to an end by the time of trial. In saying that, however, the judge did not find, but left open and perhaps somewhat obscure, the extent to which he considered that Mr Neal, while preferring to be in business for himself, might or might not be able to find employed work in the future. As for general damages, he awarded £40,000 for the orthopaedic damage and £25,000 for the brain and head injuries, making a total award of £65,000 for pain and suffering and loss of amenity.

26. On this appeal this court has accepted fresh evidence from both Mr Neal and Miss De'Tedstone and has also been presented with a number of fresh witness statements and fresh documents. It has also received a video taken on four days in July 2001, which in general shows Mr Neal coming and going between his home and the business premises, his visits in the local town while walking his dog, visiting shops and other such places. It shown him driving his car, and on two occasions riding his Harley Davidson motorbike. The Court had previously given leave to admit all this fresh evidence. We have heard Mr Neal and Miss De'Tedstone cross-examined. At the outset of this appeal, and at the time when that leave was given, it might have appeared that the video would play an important role in the defendant's

submissions. In particular, there was the prospect that the defendant would place particular emphasis upon Mr Neal's riding of his Harley Davidson motorbike as disproving his evidence at trial that he was no longer in a position to ride or handle a motorbike safely. On that basis it could be seen that this evidence would spearhead a renewed attack on Mr Neal's credibility.

27. Following cross-examination of Mr Neal, however, that aspect of the new evidence has taken a back seat and has barely figured, if indeed it has figured at all, in the closing submissions of Mr Charles Douthwaite, on behalf of the defendant. This is no doubt because he was prepared to accept, as certainly I would be prepared to accept, Mr Neal's evidence about the Harley Davidson. This evidence was essentially to the effect that it was a present which he had bought for himself after his victory in the court below; that it was especially modified for his disabilities by being lowered by two inches along it whole length, both front wheel, saddle and back wheel, and that this so lowered its centre of gravity that he could handle it with safety. Other modifications or refinements catered for the disabilities of his right leg and ankle. In the absence of such modifications, however, he said he remained unable to handle customers' motor bikes. He could neither safely ride them nor could he safely handle them. The weakness in his right leg would mean that he was always in danger of losing his balance while manoeuvring a heavy machine, and the consequence of doing so would mean a spill of the machine onto the roadway with resulting damage and expense of repairs. This aspect, therefore, of the appeal did not figure in Mr Douthwaite's closing submissions.

28. There is one other aspect of the appeal I can clear away right at the outset. It was common ground between the parties that the judge had erred in his award of general damages in the sum of £65,000. It was agreed that the correct sum for general damages should be £45,000, which was the sum for which Mr Neal had been submitting at the trial below. Nothing further, therefore, needs to be said on that score.

29. However, the two other points relating to past and future losses have remained much more contentious. A very important aspect of those two points has been the question of whether Matt's Engineering, the business which Mr Neal had started, and which he had transferred to Miss De'Tedstone in September 1998, was up to that time, as the judge found it to have been, in his sole ownership or was in truth a partnership between him and Miss De'Tedstone. Partly in the light of the new evidence before this Court, both documentary and oral, but also in the light of the original evidence before the judge, it has been necessary for this Court to look at this question again. The essential facts, in my view, are as follows. To some extent I have referred to them in setting out the outline of facts of this case, but I will now concentrate upon them in particular for the purpose of this question, of whether the business was a partnership or not.

30. One can start with Mr Neal's own evidence. In his witness statement for trial, in a passage which I have already cited, he said that prior to the accident he "owned Matt's Engineering with my partner, Jan De'Tedstone." It is possible, I suppose, that he was referring there, albeit he was speaking in the business context, of Miss De'Tedstone as being his partner in the sense of being effectively his wife and the carer of their family of three children. However, only a little later in his witness statement he described the course of the growth of their business always in the plural person. He spoke repeatedly in language such as follows:

> *"We carried on the business."*

And he said:

> *"Between us we owned everything relating to the business."*

A little later in the same witness statement, when he went on to give evidence about the intention to extend the business to providing an MOT service, he again spoke in the plural person, thus:

> "We were in a strong position to get the necessary equipment new for just £4,000."

31. In his oral evidence at trial, of which we have a full transcript, he accepted that until the transfer in September 1998 the business bank account was in joint names and that it had ceased to be in such joint name time of transfer. He was asked whether prior to his accident he had often represented himself as a partner in the business. "*Would that be fair?*", he was asked. He answered, "*That's correct, yes.*"

"Q: *And indeed subsequent to the accident and subsequent I think to September 1998 you have continued to refer to yourself as a partner in the business?*
"A: *Up until 1998, yes.*

"Q: *Not after that?*
"A: *No."*

He also described Miss De'Tedstone as being:
"...if you like, a silent partner and she had invested a great deal of her time and money into helping me build that business which supported our family and she took over the reins."

Of course, she was more than a "*silent*" partner, for from the time of the move to Wales she had worked actively in the business, as was not in dispute.

32. Turning to Miss De'Tedstone's evidence, in her witness statement at trial, she described how in 1990 they moved to Wales. The workshop was purchased:
"We took out a mortgage on the barn at Williams Street [that was the business premises]... We used my savings including the proceeds of the sale of my business to pay deposits, bank fees, solicitors' fees and all other ancillary expenses. We moved the heavy machinery and all Matt's specialist equipment to our barn. We moved our family to our new home...

"Profits generated by the business went on repairing or upgrading one or other of the 3 buildings we owned... We later went on to take out a second mortgage on this house to pay off the business mortgage on our workshop... At around the time we did that I sold my home in Surrey. This gave us £28,000 to invest in our workshop."

33. It is plain from some new documentary evidence presented to this Court on appeal that in May 2001 Mr Neal went to solicitors in order to resolve a dispute which had broken out at that time between him and Miss De'Tedstone relating to ownership of the assets of the business, such as the machinery and stores. The first letter in that series begins:
"We have been consulted by Mr Matthew Neal in connection with difficulties that have recently arisen regarding the assets of Matt Engineering and ownership of the premises."

34. A subsequent letter in June 2001 suggested, amongst a series of possible options, that the business be split into separate entities as sole traders, or that Miss De'Tedstone purchase Mr Neal's interest in the business and premises, or that proceedings be issued under the Partnership Act 1890. What happened, in the event, was that at about this time, in July 2001, the business of Matt's Engineering. Miss De'Tedstone went off and found new premises and commenced a new business under the name of Bike Spec. Mr Neal remained in the old premises, which Miss De'Tedstone had vacated, and called his new business Matt's Machine Shop. He represented that in advertising as merely being a change of name. In truth, however, it was a new business, for Miss De'Tedstone had gone off with all the spares; some, I think, but only a small part, of the machinery; all the accounts; and the existing telephone number, so Matt's Machine Shop had to advertise a new telephone number. In this connection Mr Neal began to send faxes in September and October of 2001 to his important suppliers. He described the change of name to Matt's Machine Shop as being a case of "having problems with an ex partner". In one fax he said:
"Due to a partnership split we are now no longer trading as Matt's Engineering but as Matt's Machine Shop at the same address."

35. All of this evidence to my mind strongly suggests a partnership between Mr Neal and Miss De'Tedstone. What is there on the other side? There is the fact that the accounts through all these years had always been drawn up in the sole name of Mr Neal. However, it was Mr Neal who always dealt with the accountants in question. Miss De'Tedstone played no role in that. In this connection an important change occurred in relation to the accounts for the period ending 30th June 1997. In previous years Miss De'Tedstone's injections of capital had been represented in the accounts as a loan by her to the business. In the accounts for the year ended 30th June 1997 (significantly a period before the accident even if those accounts were drawn up after the accident), that personal loan of Miss De'Tedstone to the business is removed and instead the capital account is represented in the main part by what is described as "capital introduced". The sum stated is about £45,000. That line in the balance sheet is under the heading "Capital Account - Mr MR Neal". It is perfectly clear, however, that it represents not capital introduced by Mr Neal but capital introduced by Miss De'Tedstone.

36. In these circumstances, I do not think that any weight can be put on the fact that at one time or another Mr Neal, with his accountants, may have drawn up the accounts in a way which had previously represented Miss De'Tedstone's injections of capital as mere unsecured loans or, at a later stage, represented those injections of capital as being injections by Mr Neal rather than by Miss De'Tedstone. Nor do I think it is significant in that context that it is Mr Neal only who signs those accounts as the proprietor of the business.

37. It is fair to say that there was evidence before the judge in the form of the evidence of Mr Leonard, Mr Neal's expert, that there were matters such as a Barclaycard which was in the sole name of Mr Neal, as apparently was an original business loan from Barclay's Bank. Nevertheless, those matters have to be set against all the evidence to which I have related: the purchase of the premises in joint names; a joint mortgage in that respect; a joint bank account representing the two of them as trading in the name of Matt's Engineering; the very significant investments of capital by Miss De'Tedstone; the important work that Miss De'Tedstone did in the business as the manager of one whole side of it, the spare parts side of it.

38. In his oral evidence to this Court, Mr Neal accepted that, although all the drawings out of the business went through his name, those drawings were in effect on behalf of himself and Miss De'Tedstone and went to the support of their family as a whole. They were in it, as he said, for life. In this connection, Mr Nigel Cooksley QC, counsel on behalf of Mr Neal, has reminded the Court of the provisions of section 2 of the Partnership Act 1890, which on the whole are formulated as negative propositions to the effect that one must not think that such matters as joint property in themselves go to create partnerships.

39. The facts, however, of this case are very striking. Two people, effectively husband and wife, were working together hand in hand in a business. They bought the business premises together; they fitted out those business premises together; they bought machinery together and spare parts with Miss De'Tedstone's capital; they held a bank account together; they represented themselves to their suppliers as trading together in the name of Matt's Engineering.

40. In my view it was a partnership in the fullest sense of the term. The presumption of section 24 of the Partnership Act is that in the absence of a contrary agreement or evidence, a partnership is a partnership of equals, and in my judgment this was in every sense that. It is perfectly true, as Mr Cooksley has submitted, that it may be that it was Mr Neal's fame as an engineer that was the essential element (let me even put it that high) in the business as a whole. Nevertheless, that, in my judgment, does not undermine all the indicia of partnership to which I have referred. There is many a 50/50 partnership in which only one partner is the active partner and the other partner merely provides the capital. This partnership went very much further than that.

41. What is the significance, then, of a finding of a partnership in this case? It is as follows. In the **Kent v British Railways Board** [1995] PIQR, Q42, this court held that where one member of a two-person partnership, there a husband and wife partnership, was injured, the injured person can only claim for losses to that partnership to the extent of that person's interest in it. That rule was there applied even to the case of so domestic and family a business as a husband-and-wife partnership in the running of a bed and breakfast property. A contrary submission founded on the earlier case of **Anderson v Davis** [1993] PIQR Q87, a decision of Mr Roger Bell QC (as he then was), that in such a context if all the income went to the support of the family concerned in what was in effect a joint husband-and-wife endeavour, it was not possible in reality to separate the losses. That approach was nonetheless specifically rejected in **Kent.**

42. Mr Cooksley has not submitted to this Court that it is not bound by Kent, only that as to the quantum of the apportionment between the two partners, one should take a realistic view, as this court did in a subsequent case, Ward v Newalls Insulation Co Limited [1998] 1 WLR 1722. There a husband who had a 50 per cent share in a partnership arranged with the Revenue for his wife to participate in half of his share; however, she was in every respect a mere nominee (see at 1725C). The Court of Appeal in that case said that one had to look at the reality of the situation. The reality was that, although the husband was prepared to pay half of his profits of the partnership to his wife as a nominee for valid

fiscal reasons, nevertheless the 50 per cent partnership share in reality belonged to him and he could therefore claim a full 50 per cent of the relevant loss in that respect. Mr Cooksley submits that the reality of the present case was likewise that Mr Neal disposed of all the available profit from Matt's Engineering, so that he too should be able to claim 100 per cent of the firm's loss.

43. However, that aspect of Ward does not in my judgment apply on the facts to this case. On the contrary, the situation in Kent was far closer to the situation which prevails here. For the reasons which I have sought to set out, Miss De'Tedstone was in no way a nominee but a real half partner in the business, contributing to it her capital, time and skill. Nevertheless, although I will assume, in the light of the way in which the matter has been argued, that this Court is bound by Kent, it has to be said nevertheless that some of the reasoning in Ward appears to go a certain length to undermine the logic of Kent's case: for it seems that the extent of the recoverable loss turns not so much on what a claimant's real interest in his partnership is, but on the level of his partner's real contribution (see at 1730H/1731C). This Court has heard no submissions on these matters. As I have said, I will assume this Court to be bound by Kent. Nevertheless, it may be that in a family situation, where the partnership is between the husband and wife and all the earnings of the partnership go into the single family pot to support the family income, a schematic view of that partnership which leaves the injured person able to claim only 50 per cent of the established loss to the partnership is a result which can have unfortunate consequences.

44. However, the matter cannot be taken any further on this occasion. The position, therefore, is that the doctrine of Kent needs to be applied to the findings of the judge so far as they continue to be relevant on this appeal in the light of the new evidence before this Court. In this connection, let me deal separately with the past losses and the future losses. In respect of the 1998 year, Mr Douthwaite makes no complaint about the finding of a loss of £7,000, subject to the partnership point. As for the 1999 and 2000 years, he raises the partnership point again, but he also has a point on quantum to the effect that the judge was wrong to be impressed by what he submitted was the merely speculative evidence about the proposed new venture for an MOT station in the business. It seems to me that this Court cannot possibly revisit the findings of the judge in this respect. Those findings were based upon the evidence of Mr Neal, Miss De'Tedstone and an independent witness who ran another MOT business in the vicinity, a Mr Smith. The judge accepted that evidence. He also accepted the expert evidence of Mr Leonard, Mr Neal's expert accountant, concerning the additional profits that the MOT venture would have earned, profits which on that evidence were very significant, amounting to some £7,000 in 1999 and some £11,500 in 2000. In my view, therefore, there is nothing in the point about the speculative nature of the MOT venture.

45. The position, therefore, in respect of past losses is that the £22,000 stands as the general quantum of loss, but under the doctrine of Kent it must be divided in half so that only £11,000 of that £22,000 applies to Mr Neal. To that extent, on that point this appeal succeeds.

46. I turn finally, therefore, to the important question of future loss of earnings. The judge here found a multiplicand of £10,000 and a multiplier of 15. It is possible to analyse that finding of £10,000 in the following way: the £15,000 past loss of profits in respect of the two years 1999 and 2000 represent a true loss of profits for those years of £35,000, less a discount of approximately £10,000 a year in respect of Mr Neal's earnings from Remploy and, after that arrangement had ceased, from the drawings out of the till of £200 a week. That figure of £35,000 for the combination of those two years is consistent with the evidence given by Mr Neal's expert accountant, Mr Leonard. If one, therefore, carries forward an average profit of at least £17,500 per year for the following years, and allows a discount for earnings that the judge may have assumed that Mr Neal would be able to earn for himself, one could get to an explanation of the judge's figure of £10,000. In support of that way of looking at the matter, one has the judge's findings that the business, Matt's Engineering, would, as he felt certain it would, continue; and that even if it failed, after a relatively short space of time Mr Neal would find himself back in business for himself. Mr Neal is obviously a man who enjoys the independence of being his own boss.

47. Be that as it may, Mr Douthwaite submits that the £150,000 award in respect of future loss of profits should, on the Kent principle, likewise with the past loss of profits, be divided into two, and should be

reduced to £75,000. On the other hand, this Court is faced on the new evidence by a new situation. The judge clearly based his finding in respect of future losses upon the primary assumption that the business of Matt's Engineering would continue in its present form. It is now known that that has not happened. That business came to grief with the necessity of Mr Neal and Miss De'Tedstone parting ways, which they did in the summer of 2001. Mr Neal has started his own business. He has presented accounts for that new business for the period from 1st August 2001 to 10th April 2002; that shows a turnover of some £29,000 but a profit of only some £500. The turnover of £29,000 in itself is not perhaps insignificant. Prorated to 12 months it represents a turnover of almost £45,000, which for a business thrust back solely upon the engineering services of Mr Neal and bereft of the spare part business that Miss De'Tedstone was in charge of represents, it might be said, a fair beginning. The profit, however, is very small.

48. Mr Douthwaite submits that the judge, and if not the judge this Court in the light of the new evidence of the break up of the old business, is entitled to take, and in fairness and justice should take, a broader view of Mr Neal's situation. On medical evidence about which there is no dispute Mr Neal has been seriously disadvantaged, not only physically in that he can no longer test drive his customers' bikes, nor handle them, nor lift heavy weights, but also mentally, in terms of his ability to concentrate and to work for longer rather than shorter hours; and he is more irascible, and has less patience in dealing with people than before. The judge said nothing explicit in his judgment about what he considered to be Mr Neal's overall handicap on the employment market. In the light of the new evidence on this appeal, which disappoints the judge's firm expectation, Mr Neal no longer has the support of an enterprise in which Miss De'Tedstone was at his right hand running a second leg of a combined business. He has to start anew for himself. His new business may fail; he may not be able to support himself, as he plainly would wish, as his own boss; he may be forced to look for employment elsewhere. In those circumstances, on the findings of the judge, he would be severely handicapped. In my judgment, this Court, in the light of the new evidence, is entitled to take a fresh look, to stand back and look at the whole question not only of what Mr Neal has lost in terms of his old business partnership, as in my judgment it must be viewed, but also what he has lost in terms of the whole of his future as a, relatively speaking, still youngish man.

49. In my judgment, looking at the matter overall, and taking account of all the facts found by the judge but also of the additional evidence heard by this Court, and taking account in particular of the important factor of Mr Neal's handicap on the employment market, the right figure to take is a figure of £120,000. That figure could possibly be looked at on a multiplicand and multiplier basis as representing the loss of half the old firm's profits less a cautious discount for Mr Neal's earning capacity in an entirely new situation. In truth, however, it is perhaps better seen as an attempt to assess, against the background of Mr Neal's previous right to a half share in the profit of his partnership with Miss De'Tedstone, the overall loss to his earning capacity over the remainder of his working life. It is true that he has lost only half of the old firm's profits; but thrust back as he is on his own, and bearing in mind the substantial restraints on his earning capacity, I cannot see, doing the best I can, that a sum of £120,000 overstates what he has lost. In my judgment, therefore, that would be the correct and fair solution of this appeal in respect of future loss of earnings.

50. In sum, therefore, this appeal succeeds on each of the three points, but only to this limited extent: the general damages fall from £65,000 to £45,000; the past losses fall from £22,000 to £11,000; and the future loss of earnings falls from £150,000 to £120,000.

51. **LORD JUSTICE KEENE:** It seems to me that any award for future losses should include some allowance for the handicap which Mr Neal is likely to suffer in the labour market. That, to some extent, though not entirely, counterbalances the partnership aspect which must reduce the amount recoverable for future loss. Taking both factors into account, and looking at the situation as a whole, I agree that an award of £120,000 properly reflects this item in the total amount.

52. **LORD JUSTICE BROOKE:** I agree with Rix LJ. This is not the appropriate occasion on which to explore all the ramifications of the decision of this court in **Kent v British Railways Board** [1995] PIOR 042. In that case a husband and wife were running a teashop business as a joint venture in the premises they jointly owned in Dorset at the time of the wife's accident. They had been running a bed and breakfast

business there as well until shortly before the accident, and they were intending to resume that business afterwards. The wife was 51 at the time of her accident. For tax reasons they had arranged for the Inland Revenue that they should be assessed on the profits for the business as to 60 per cent on the husband and 40 per cent on the wife. The High Court Master allowed the plaintiff to recover the whole of the loss of profits and profitability of the business as part of her damages for loss of earnings. This court held that, whatever they might have agreed with the Revenue for tax loses, the reality of the situation was that they owned the business 50150. In these circumstances, it held that the wife was only entitled to recover her 50 per cent share of the lost profits. She could not recover for her husband's loss.

53. In **Ward v Newalls Insulation Co Limited** [1998] 1 WLR 1722, after what appears to have been much fuller citation of authority, this court reserved judgment after a two-day hearing. The facts of the case were totally different, but again the court said it should look at the reality of the situation. Henry LJ said, in the course of his judgment, at page 1733:

*"We have re-read **Kent v British Railways Board** [19951 PIQR, Q42 carefully, and do not find it in conflict with the conclusion we have reached. There Sir John May was dealing with a partnership to the success of which both husband and wife contributed. The judge declined to accept the apportionment agreed by the Revenue. And in adopting the presumption of equality in default of agreement under section 24 of the Act of 1890, he expressed himself as looking at the reality. We are sure that if the reality (of the plaintiffs loss measured by her contribution) had been 70 per cent he would have found for that figure. There is no reason (and no power) for the judge to trump reality in a personal iniurv claim by any internal allocation of the division of profits in a partnership which does not reflect the true value of the partner's contribution."*

54. In the present case, like Rix LJ, on the rather unsatisfactory evidence that is before us, I am not willing to try and distinguish the case of Kent. Mr Neal contributed his considerable skill to the business. Miss De'Tedstone contributed her full-time labour and virtually all the capital on which the business depended, and the premises in which they ran the business were jointly owned. In those circumstances, the reality of the situation was that the profits that the business generated belonged to them in equal shares and Mr Neal can only recover his 50 per cent share on the authority of Kent.

55. I agree that now we have received new evidence which was not available to the judge, we should take into account the arguments raised in the respondent's notice. For my part I would distance myself from any calculations based on multiplier and multiplicand. I would look at the matter as a jury would and as Stuart Smith LJ did in the case of **Cornell v Green** (Court of Appeal transcript 20th March 1998). In my judgment the sum of £120,000 is the appropriate sum to award Mr Neal for his future loss of income, however it may occur in the years to come, when his earning capacity is clearly significantly diminished in consequence of the accident.

56. I agree with Rix LJ's assessment of the remaining issues on this appeal, and I too would allow the appeal to the extent that he has suggested.

Order: Appeal allowed with costs, but to be reduced by £5,000. General damages reduced from 65,000 to £45,000; past losses reduced from £22,000 to £11,000; and future loss of earnings reduced from £150,000 to £120,000.

MATTHEW RUSSELL NEAL V MRS ALISON JONES T/A JONES MOTORS [2002] EWCA Civ 1730

PROCEEDINGS AFTER JUDGMENT

1. LORD JUSTICE BROOKE: That will be £63,000 off the principal sum; goodness knows what off the interest.
2. MR DOUTHWAITE: Would your Lordships be content if Mr Cooksley and I agreed that?
3. LORD JUSTICE BROOKE: I am sure that we and the associate would be thrilled.
4. MR DOUTHWAITE: My Lord, I think it is 61, is it not?
5. LORD JUSTICE BROOKE: 61,000.
6. MR DOUTHWAITE: 61,000.
7. LORD JUSTICE BROOKE: That is right.
8. MR DOUTHWAITE: Yes. My Lord, I also make an application for costs of the appeal. It is not simply because I have achieved a substantial reduction. It will not surprise your Lordships to hear that there have been some offers made in passing between the parties, but they were summarised by a letter of my solicitors dated 8th May this year. There has just been one offer made on my side. We offered to reduce the judgment sum to £205,000. I estimate that your Lordships' judgment takes it to just below that, by about a thousand -- excluding the interest, it takes it below that by about £1,000, whereas the highest offer in terms of reduction made by the claimant was some £36,000 off the totality of the judgment, which would take it down to 230-odd thousand pounds.
9. LORD JUSTICE BROOKE: Yes.
10. MR COOKSLEY: My Lord, I cannot oppose the application for costs, but I would say one thing about the costs of today. Your Lordship on the last occasion did commend to the parties mediation.
11. LORD JUSTICE BROOKE: I certainly did.
12. MR COOKSLEY: Our side wrote to the other side saying that we were prepared to agree to mediation. That was turned down by the other side, and if I can remind your Lordship of what your Lordship said in a practice note in **Dunnett(?) v Railtrack**, your Lordship said in that situation cost consequences can follow pursuant to CPR Part 34. I would certainly submit that since we were prepared to avail ourselves of your Lordship's offer on the last occasion -
13. LORD JUSTICE BROOKE: Was mediation turned down flat?
14. MR DOUTHWAITE: I can hand up a bundle of correspondence which your Lordship can see. I can certainly -
15. LORD JUSTICE BROOKE: It is in the back of the bundle, is it not, what I said?
16. MR COOKSLEY: Yes.
17. LORD JUSTICE BROOKE: Bundle A.
18. MR COOKSLEY: My Lord, this contains all the offers, but all you are concerned with is the letter towards the back of the bundle, which is about the fifth page from the back, 2nd May 2002 on the top left-hand corner.
19. LORD JUSTICE KEENE: Humphreys & Co to Mr John A Neal?
20. MR COOKSLEY: That is right. "We refer to the hearing before Brooke LJ and Sir Christopher Staughton." The relevant paragraph is 2 and 3. And then -
21. LORD JUSTICE BROOKE: You say mediation may prove to be a pointless exercise if your client is not prepared to part from the position of requiring reduction of the judgment by over £60,000.
22. MR COOKSLEY: Well, we said it may prove to be, but we did send reminders. And you can see the correspondence ends on 8th May, John A Neal to my solicitors. It is the last paragraph of that letter: "When urging the parties to negotiate, Lord Justice Brooke clearly did not know of the offers put forward..."

23. LORD JUSTICE BROOKE: I did not make the suggestion, unless it was perfectly obvious, that costs were running up.

24. MR COOKSLEY: Well, indeed.

25. LORD JUSTICE BROOKE: Offers were being made which, being unsatisfactory, were not being accepted, and cried out for a mediator.

26. MR COOKSLEY: Well, that is right, so the relevance of past offers is of little significance. Then on 24th May we wrote saying:
"When we last spoke and when you last sent a without prejudice letter to us you appeared to be unenthusiastic of our suggestion of mediation but you were to take your client's instructions.
"We would be grateful if you would let us know your client's position with regard to that suggestion."
Then finally on 13th June, the other side write:
"We confirm that we do not have any further instructions from our client concerning your suggestion."

27. So we tried, but it was turned down.

28. LORD JUSTICE BROOKE: Not very clever, Mr Douthwaite.

29. MR DOUTHWAITE: My Lord, may I invite you to read two passages from this document, because in actual fact, my Lord, the suggestion that your Lordship made, which was a perfectly sensible and proper suggestion, was on 19th April, when very substantial costs had already been incurred.

30. LORD JUSTICE BROOKE: Huge costs, further costs, were going to be incurred.

31. MR DOUTHWAITE: The costs attributable to today only, my Lord, and -

32. LORD JUSTICE BROOKE: I wanted to cut out the whole of this hearing.

33. MR DOUTHWAITE: Well, my Lord, yes, had that been possible. But let us just look at the correspondence. Can I take your Lordship -- the bundle is not paginated, but if your Lordship finds the letter dated 12th April.

34. LORD JUSTICE BROOKE: Of which year?

35. MR DOUTHWAITE: Sorry, 2002, this year. And if you turn to the second page of that letter, paragraph number 12, Humphreys is writing to those instructing me, my Lord:

    "As we indicated to you on the telephone, it is of no interest to our client to conclude a settlement on the basis that he pay your client's costs of the appeal now that most of those costs would probably have been incurred, but it does seem sensible for the parties to explore the possibility of a settlement between their respective positions of £205,000 and £235,000 on the basis that the parties walk away on the question of costs. For one matter, an order for costs would result in continuing uncertainty from the point of view of both parties and the additional expense of dealing with the question of assessment of costs."

36. LORD JUSTICE BROOKE: Does that mean they bear their own costs in the appeal?

37. MR DOUTHWAITE: Yes, indeed. Now, they were already very substantial. Now, that was picked up in the following letter, by the penultimate paragraph, on 15th April. And then, my Lord, the letter that I have referred you to without actually showing you is that dated 8th May, which I submit sets out very fairly and fully the true position between the parties, and over on the second page where the position in relation to costs is raised.

38. Now, my Lord, it may well have been that -- may have been, because of course mediation is not necessarily binding and does not necessarily produce a result, but mediation would have incurred its own expenses, would have had an uncertain outcome, and we were faced by a party that had set its face against any payment of costs that had already been incurred on the appeal. Therefore, going down the road of mediation, where that party has simply said, oh, yes, we would like to mediate, but we would like to mediate on particular restrictive terms, it is really a question of the pot calling the kettle black.

39. LORD JUSTICE RIX: It was not a frequent issue, was it, as expressed in the 2nd May letter? It is simply saying, it may prove to be pointless if there is not a move from the current positions. But that probably goes without saying, does it not?

40. LORD JUSTICE KEENE: The whole purpose of the mediation is to get parties to shift from positions they have previously adopted.

41. MR DOUTHWAITE: My Lord, I accept that, but what we have is the lion's share of the appeal costs already incurred; one party -- well, both parties being quite a long way apart, and one of those two parties actually saying, "And, in addition, we are not prepared to pay your costs."

42. Now, bearing in mind that the mediation bears its own costs, and the outcome is uncertain, my submission would be, perhaps unusually, but in this case it was perfectly reasonable for the appellants to say, well, we see little point in the mediation road, having regard to the position we are in and your expressed attitude. That is effectively what is fully set out in my instructing solicitor's letter of 8th May.

43. LORD JUSTICE BROOKE: Mr Douthwaite, you say costs have been run up.

44. MR DOUTHWAITE: Yes.

45. LORD JUSTICE BROOKE: But when we look at these costs bills for hearing and we see counsel briefed for a two-day appeal, six figure sums bandied around and solicitors coming up from Cardiff or South Wales for a two day appeal, those costs are very heavy.

46. MR DOUTHWAITE: I am not suggesting, my Lord, that the costs for the last two days will not be substantial. I am not suggesting that at all.

47. LORD JUSTICE BROOKE: This is what we hoped Sir Christopher and I had in mind. For goodness sake, get somebody to knock these parties' heads together before the astronomical costs of a two-day contested hearing are incurred in this court.

48. MR DOUTHWAITE: My Lord, I entirely agree, but there has to be at least a sign -- a mutual sign that the parties are prepared to come together, and it is all very well for one party to say, oh, we would like to mediate, when it is taking what appears to be, summarised in the letter of 8th May, a pretty mean approach; and it has already said in relation to costs, well, we are not prepared to countenance them.

49. What we have incurred in this case prior to your Lordship's direction in relation to mediation was there had been of course all the immediate costs of the appeal: the appellant's notice, the skeleton argument, the preparation of bundles, the obtaining of transcripts, the respondent's notice, the respondent's skeleton argument, the transcripts. Then there was a directions hearing before Henry LJ and Hale LJ, and then this matter was listed for appeal, so that the brief fees had been incurred when it was last before your Lordship in April.

50. And so what we have for today, at least speaking for my own part, it is refreshers only, plus of course the witness costs. And that is why I say, well, what was really left in my instructing solicitors's mind was, yes, we have the cost of a hearing, yes. I am not saying that those costs will not be substantial, but by the date of the material correspondence the lion's share, the greater part of the costs of this appeal, had already been incurred, and we have the attitude from the claimant that they are not prepared to countenance an offer of costs.

51. LORD JUSTICE BROOKE: Anything you want to say?

52. MR COOKSLEY: Well, only that when we last came before the court we did not know there was going to be oral evidence, so it was not a case of having prepared for a two-day hearing before the last hearing, my Lord. I mean, I thought the purpose of mediation is where you have parties who are completely entrenched, as these were, it might break the log jam. It is not an excuse to say, oh, mediation will not work because the parties are entrenched.

53. LORD JUSTICE BROOKE: We will retire.

RULING ON COSTS : NEAL V JONES T/A JONES MOTORS

1. LORD JUSTICE BROOKE: There is no dispute in principle that the defendant/appellant should be entitled to his costs of the appeal. There is one issue, however, in relation to costs.

2. When the matter came before Sir Christopher Staughton and me on 19th April 2002, the parties were extremely anxious that the matter should be finally decided in this court, while we were indicating to them that this court might very well remit the case for a further trial by judge at first instance. In the event we ordered oral evidence exceptionally in this court and we set aside a two-day hearing. In those circumstances, I repeated what I had previously said about my hope that the parties might consider mediation in relation to this matter.

3. I know that mediation is a comparatively new art form. It is not usually thought to be particularly suitable for personal injury cases, but the recent research report by Professor Hazel Genn indicates that it is succeeding now in areas of litigation where it was not expected to succeed two or three years ago. As I pointed out at the hearing on 19 April:
"Given the admitted damage to Mr Neal's powers of concentration and the pain he is suffering, I would hope that the parties may be able to reach a financial settlement of this unhappy dispute without the need for a further hearing in this court. That is just a hope and certainly not a direction."

4. I am not at all surprised to hear that offers had been going to and fro between the parties before that hearing. That hearing had in fact been listed for the hearing of the appeal. Counsel were briefed to argue the appeal, and it was only because of the new evidence that we admitted at the defendant's request and because of the parties' requests to us that we kept the matter up in the Court of Appeal for two further days and that we made the direction we did.

5. The defendant's advisers were present in court before Sir Christopher and me on 19th April and heard what we had to say. By letter of 2nd May the claimant's solicitors said:
"In accordance with the suggestion by Lord Justice Brooke, our client is prepared to consider the option of mediation so that a settlement may be concluded if at all possible. Plainly, if your client is not prepared to depart from its position of requiring a reduction in the Judgment by over £60,000 and the recovery of all of its costs, mediation may prove to be a pointless exercise."

   In that letter there they reflecting the stance that had been taken by the defendant's solicitors on 15th April 2002. Their offer of mediation received an interim response on 8th May. Without consulting their insurer client, the defendant's solicitors said:
"When urging the parties to negotiate, Lord Justice Brooke clearly did not know of the offers put forward by the parties since the commencement of the Appeal. In view of the extent of the costs of the Appeal, these now become a substantial issue. You ask for our views as to whether our Insurer Client is prepared to participate in a mediation process. Without seeking specific instructions, we cannot really anticipate their response and so we are writing to them for instructions."

6. Of course I did not know of the terms of any offer, but I would have been astounded if offer and counter offer had not been made in the period between the hearing at first instance and the hearing before us on 19th April.

7. A chasing letter was sent, and on 13th June 2002 the reply came back:
"We confirm that we do not have any further instructions from our client concerning your suggestion.
You say that our response was unenthusiastic. We have simply taken a neutral position... We will contact you again as and when we receive further instructions."

8. Since the insurer client gave them no further instructions, the defendant's advisers did not reply positively in any way to the suggestion made by this court that mediation might be an appropriate way of resolving the matter. If they had come back and explained in a rational way why they rejected mediation, despite the knowledge and experience of the members of this court about the potential value of mediation in this type of case, then it may well be that they would have protected their position as to recovering all the costs of the appeal. But in the light of the insurer's apparent unwillingness to give their solicitors instructions to enable them to demonstrate how they were fulfilling their obligations under CPR Part 1, and in particular CPR 1.3, the Court considers that the appropriate course to take is to reduce the amount of costs recoverable by the defendant by the sum of £5,000.