CA (at Cardiff) on appeal from Cardiff CCC (His Honour Judge Gaskell) before Woolf LJ MR ; Pill LJ; Judge LJJ. 22nd October 1999.

JUDMENT : JUDGE LJ (giving the first judgment at the invitation of Lord Woolf MR).

1. In this action for damages for personal injury sustained by the claimant in road traffic accident, liability was admitted.

2. On 12 February 1999 at the Cardiff County Court after a reserved judgment, Judge Gaskell entered judgment for the claimant for £85,323, plus interest, later agreed at £4,000. He ordered the defendant to pay the claimant's costs of the action. The present appeal is concerned only with his order for costs.

3. On 16 April 1998 the defendants paid £53,888 into court and followed this up on 17 July with a further payment-in of £41,112. The hearing to assess damages began on 17 September 1998 and continued on 18 September. It resumed again on 5 and 6 November when the case was again adjourned, this time to 25 January 1999. Finally, the reserved judgment was given on 12 February. Therefore, the payment into court was made well before the trial began and, in the result, exceeded the claimant's award of damages.

4. In exercising his discretion to make the order that the defendants should nevertheless pay the claimant's costs, Judge Gaskell attached importance to two features beyond those encompassed by the brief summary so far.

(1) Video evidence

5. At the conclusion of the hearing on 18 September, the defendants decided for the first time that they should employ an inquiry agent to keep observation on the claimant. These were maintained on 5, 7, 19 and 20 October. In the result, they were of assistance to the defendants' case. The video recordings were disclosed to the claimant's solicitors on 26 October. Permission was sought for this evidence to be admitted and was granted on 2 November. When the trial resumed the claimant was further cross-examined about the results of the surveillance.

6. In his judgment on the damages issue, Judge Gaskell referred to the impact of this evidence. Dealing with the claimant's post-concussional syndrome, which had developed into a major depressive disorder, he said: *'I find that some of her evidence is unreliable if taken to reflect the totality of her state. Her evidence concentrates on the worst times. It is not balanced by what she was able to achieve when she was better. What she says about her limitations accurately reflect what she can and cannot do when she is in the depths of her despair, but that is not the situation all the time, and the video evidence does disclose an ability to manage to a significantly greater extent than she was prepared to admit.'*

7. Significantly, the judge then made this express finding: *'I do not think that the plaintiff was deliberately lying. I think there is a failure on her part to recognise that there are times when she can do much more than she does, and in fact to recognise that on occasions she does do more for herself. I think there is force in the submission that once the plaintiff was regarded as limited in her capabilities, it was easy for her to regard that as the norm, whereas in fact it may reflect the situation when she is at her worst. It is the nature of the illness that it fluctuates.'*

8. In his judgment on the issue of costs, the judge explained the impact of the video evidence in similar but not identical language. He said: *'The video evidence has been very influential, in my judgment. It demonstrated that the plaintiff had a degree of mobility that was not apparent from her evidence, or indeed her statement. What she was saying was known well in advance. I have found that there were periods of time when she was significantly disabled and housebound, and that her evidence reflects her looking at her illness through the worst of times. I have to say if I had not had that video evidence, the level of care I would have awarded would have been substantially greater.'*

9. He then continued his judgment ending: *'It was only the disclosure of the subsequent information that made her vulnerable to the payment into court.'*

10. Before considering the consequent conclusions, it would be convenient to mention the second feature impacting on the judge's costs decision.

(2) Life expectation

11. This concerned, in reality, the multiplier for future care. This issue was canvassed late in the trial without any pre-echo in the pleadings, reports or witness statements, nor, in particular, in the counter-schedule of damages served in late August.

12. The claimant undoubtedly suffered from a pre-accident constitutional asthmatic condition. Eventually, as the litigation developed, and it seems at the time when the trial began, this was seen as potentially relevant to her life expectation, but at the last moment, even more significantly to the assessment of the multiplier to be applied to the cost of future care, which, taking into account the video evidence, was eventually assessed at £1,987·4344 annually.

13. In his judgment on the damages issue, the judge assessed the multiplier at 14 years on the basis that by the time the claimant reached 69 years, ie 20 years after the hearing before him, she would in any event require the same level of care as she presently needed; all of that due to her underlying asthmatic condition. No one suggested that her life expectation was sufficiently reduced that her need for care irrespective of the accident would not have continued until after 69 years. What the judge said in his judgment was clear. He reviewed the evidence of the medical experts in this field and said: *'I accept that by the time she is in her late sixties, the probability is that the plaintiff would need help in any event because of the deterioration of her condition due to asthma … the plaintiff will in all probability require the same degree of care as she requires now because of these other problems; she would require them in any event.'*

14. In his judgment there is nothing to suggest that the assessment of the multiplier of future care was reduced because of a limited life expectation. On the face of it, it appears to have been reduced because the underlying asthmatic condition would have caused the claimant's health to deteriorate so that she would require the same level of care as she required from after the accident. In short, from the age of 69 this care would be needed anyway, therefore, the claimant was in difficulty on causation.

15. In his judgment on the costs issue the judge said that it was inexplicable that the defendants had not chosen to obtain their own evidence on the topic of life expectation until 3 October. That report raised questions about life expectation, which, we are told, had been the subject of discussion between counsel during the first two days' hearings. The claimant's counsel took the decision that, if any point was to be advanced in relation to reduced life expectation, there would need to be a supplemental medical report. This was duly provided. In my judgment the stance taken by the claimant's counsel was not in any way unreasonable.

16. Leave was given by the judge for this evidence to be adduced. The claimant was permitted to call a physician of her own. In reality there was no issue between the doctors and, in his judgment on the costs issue, the judge amplified the way in which the issue of the cost of future care had developed from the issue of life expectation. He said, in the context of examining the issue of life expectation: *'Not disclosed in that report, but later emerging towards the very end of the trial, was a submission that the plaintiff's need for care from the defendants was in any event to be reduced because the plaintiff's asthmatic condition would reduce her to a state where she needed similar care some three years earlier.'*

17. The judge went on to reflect how the evidence in relation to life expectation and this submission had affected his judgment, suggesting that he might have increased the multiplier to over 18 years, but adding that he had not done the precise mathematics.

18. There is one further significant feature of the evidence on the material before us on this issue. When he heard the argument about costs, the judge was informed that when the video evidence was made available to the claimant, she attempted to settle the case by accepting the sum paid into court, with her costs to be paid in full, according to the judge's understanding, as shown in his judgment, up until the date of disclosure of the video. Whether that particular refinement is accurate or not, the defendants declined to settle on this basis. They insisted that the claimant should pay their costs from the date of the payment into court. So the case went on for, in total, a further four days.

19. On the judge's analysis, the award for damages in relation to costs of future care would not have been very much greater even if he had taken the longer multiplier. It would have represented another four

years to a multiplicand of less than £1,900 per year. He explained in his judgment that his assessment of damages was far lower than it would have been because of the video evidence.

20. The defendants' contention before him, and developed succinctly by Mr Jones before us, was very simple. The payment into court exceeded the award of damages; therefore the normal order should follow. The claimant should pay the costs after the date of the payment into court.

21. The judge was unpersuaded that the issue was so simply resolved. He asked himself what he should do in the situation which had developed before him and in the light of the facts now narrated. He said: *'Once the plaintiff's offer had been rejected [that was her offer to settle for £95,000, money into court together with her costs] what could the plaintiff do? The plaintiff was tied into the trial.'* He continued: *'This is a case where the admission of fresh evidence leaves open the question of costs, and the consequences of late disclosure, late discovery in this case, and the admission of evidence which had not previously been disclosed to the plaintiff, is that the effect of the payment in is nullified. The plaintiff quite simply could not assess the merits of it. Once the payment in was made, the plaintiff did everything she could do, in the light of the evidence.'*

22. The judge then recorded that he was unable to accept the submission by Mr Jones saying: *'I take the view that the defendants have brought this upon themselves. There is no reason why that evidence could not have been obtained earlier. This case has been going on long enough. They could have obtained video evidence in advance. There is no reason why the evidence of Dr Smith [on the life expectancy issue] could not have been obtained and disclosed in advance. The plaintiff has had to deal with these as and when they arose.'*

Accordingly, having reflected on these matters, the judge held that the claimant was entitled to her costs.

23. This exercise of the judge's discretion is criticised by Mr Jones.

24. As to the video evidence, he suggests, in summary, that this was not fresh evidence at all, at least in the sense that the claimant knew, or should have known, or, if her advisers had investigated matters more closely they should have known, that her condition, as eventually revealed by the video, was much less parlous than she was suggesting in her statements and her oral evidence.

25. The effect of the video, therefore, was to correct the false impression she had created and to enable the judge more accurately to decide the truth of the case and proper level of damages. There was nothing underhand or disreputable in the defendants' arrangements to maintain surveillance, indeed, so it is suggested, the arrangements followed the unexpected failure of the claimant to make concessions about her lifestyle. So the video proved facts about which she had been cross-examined and which apparently she had denied. The effect was that her condition was not nearly as bad as she claimed. Accordingly, Mr Jones suggested, she should not benefit in costs from her failure to provide the court with accurate information, which had, in the end, meant that she had not defeated the payment into court.

26. As to the life expectancy issue, in the result, this played no direct part in the assessment of damages. The multiplier adopted by the judge arose from his conclusion on the causation issue and the claimant's underlying condition. But Mr Jones frankly accepted that his argument on this subject before the judge followed as a corollary of the late service of evidence that the claimant's life expectation was reduced by her underlying condition. This explained the language used by the judge in his judgment on the costs issue.

27. When I first considered these papers and the skeleton arguments prepared by counsel, I was attracted by Mr Jones' contentions. That being my reaction after considering the papers and argument, I suspect that, if I had been the trial judge, I might well have made a different order from the one he made. To be specific, in particular, I should at least have been tempted to make an order that there should be no order for costs after the date of the payment into court.

28. I record that and then add that I have reminded myself, as Mr Jones recognised from the outset, that that is not the point. The appeal can only succeed if it can be shown that the exercise of the judge's discretion was flawed or plainly wrong. It is not enough to conclude that, faced with the same problem, I might have produced an answer different from the judge's answer.

29. Whatever the starting point, or even what can be described as the 'normal rule' when faced with a payment into court which exceeds the award of damages, the judge reaching his decision about costs is

required to take into account all relevant aspects of the litigation. This includes late disclosure, late service of evidence or the development of unanticipated contentions, and the stage in the litigation when these events have occurred, their nature and their effect on the outcome.

30. Civil litigation is now developing into a system designed to enable the parties involved to know where they stand in reality at the earliest possible stage, and at the lowest practicable cost, so that they make may make informed decisions about their prospects and the sensible conduct of their cases. Among other factors the judge exercising his discretion about costs should consider is whether one side or the other has, or has not, conducted litigation with those principles in mind. That is what Judge Gaskell did here and he was right to do so.

31. The principles apply with particular force in personal injury litigation when it is to be contended that the claimant is a malingerer, or fabricating evidence, or wildly exaggerating symptoms or their effect. Sometimes claimants do lie, embellish or fantasise, but if that is to be the defendants' case fairness demands that the claimant should have a reasonable opportunity to deal with these allegations. Sometimes sensible grounds for maintaining surveillance on a claimant may arise after the trial has begun. If they do, the defendants cannot be criticised for taking advantage of the opportunity given by an adjournment to do so. Every case, and every consequential costs order, depends upon the individual facts of the case.

32. In the present case, it is sufficient to say that I can find nothing in the evidence to explain why the defendants found it necessary to maintain surveillance on the claimant after the trial had begun when they had not done so before it. It would be flattering to describe this decision as a last minute idea. It did not occur until after the trial had begun and for no apparent reason, save that the defendants hoped to use the adjournment to improve their prospects in the litigation by taking steps that they could and should have taken much earlier.

33. In this case, if the judge had concluded that the claimant had been demonstrated by the video evidence to be a malingerer, dishonestly exaggerating her symptoms, I have little doubt that he would have taken the view that, even if the video evidence had arrived late, the claimant should not be permitted to escape the consequences of the revelation, even late, of her attempted fraud. That is a matter of speculation and it is not this case. The judge expressly exonerated the claimant from the taint of dishonesty and, by implication at least, accepted that her inaccuracy about her condition was itself a manifestation of the mental state to which she had been reduced as a result of her injuries.

34. As the judge said, it is the nature of the illness that fluctuates and, in parenthesis, she was conscious only of the bad phases. The judge was entitled to take these considerations into account. Equally, if when the video evidence had been served the claimant had sought to brazen it out, rather than, as she did, recognise the reality revealed by the video and made some effort to settle the claim by reference to the money into court, the judge might well, as he would have been entitled, have taken a different view of the way in which his discretion should be exercised: similarly, if the defendants had proposed some offer which acknowledged the late service of this crucial material. In the context of the timings, it seems hardly relevant that, if the claimant had been allowed to take the money out of court, she would have recovered some £6,000 to £10,000 more than she was eventually awarded. The question is whether she responded reasonably to the arrival of the video evidence after her evidence had apparently been concluded, and part way through the trial before damages were finally assessed.

35. In my judgment, the judge was entitled to conclude that, given that the claimant was not acting dishonestly, her response to the video was entirely reasonable and it did not meet a similar response from the defendants.

36. These considerations were all relevant to the decision which the judge was required to make. So, too, was the apparently advantageous and late development of what I have described in this judgment as the 'causation question', again arising from a point equally unheralded before the start of the trial.

37. In the final analysis, notwithstanding its late service, the defendants were granted leave to produce their video evidence, to re-open the cross-examination of the claimant and, later, to put in their evidence relating to life expectation. Those were all decisions that the judge was entitled to reach and they are not

criticised on behalf of the claimant. They had the effect of reducing the damages, which would otherwise have been awarded to the claimant, and rightly on the evidence. From the defendants' point of view, the evidence had therefore had its beneficial effect and, perhaps combined with the point on causation, the video material reduced the award below the sum paid into court. It therefore cannot be said that the new evidence did not give the defendants the proper advantage, which they were entitled to have. That left the judge to exercise his discretion about costs. That is what he did. He plainly bore all the considerations in mind and gave them anxious evaluation.

38. In the end, notwithstanding my earlier doubts, I am not persuaded that his careful analysis was flawed or that there is any proper basis for interfering with his decision. Indeed his judgment has served to undermine the importance, rightly and increasingly, to be attached to civil litigation being conducted openly between the parties with the real issues between them efficiently and quickly identified and investigated, without, as it now seems to me, any unfairness to these defendants in this case.

Accordingly I would dismiss this appeal.

PILL LJ. I agree.

39. The trial began on 17 September 1998. Both parties had prepared for trial and the relevant documents had been disclosed. Schedules of special damages had been exchanged. The defendants had, well before the trial, made a substantial payment into court. At the hearing on 17 and 18 September evidence was given by the claimant, who was alleging a considerable disability resulting from the relevant accident. Unfortunately the case then had to be adjourned for a period of about seven weeks until 5 November. The defendants' advisers took the opportunity to obtain further evidence. There was video surveillance of the claimant. They also obtained a further medical report from Dr A P Smith, consultant physician. The documents were disclosed.

40. At the resumed hearing, the judge gave leave for the admission of the further evidence and there was further cross-examination of the claimant. On the basis of the evidence as it then stood, including the fresh evidence, the claimant offered to accept the sum in court provided her costs throughout were paid. The defendants declined to accept that offer and the trial proceeded. In the event, the claimant did not beat the payment into court, but the judge, nevertheless, awarded costs throughout in her favour. The judge's decision, both on the merits of the action and on the costs application, was carefully reasoned and included an assessment of the claimant's credibility which was not unfavourable to her.

41. The new evidence raised substantial questions as to the seriousness of the claimant's disability and as to the length of time for which her need for future care was attributable to the relevant accident. The new evidence had a substantial effect on the damages awarded and the payment-in would have been beaten, but for the judge granting leave to admit the fresh evidence. In those circumstances the judge was, in my judgment, amply entitled to reach the conclusion that the claimant was entitled to her costs, notwithstanding her failure to beat the payment-in.

42. It is important that parties prepare for trial, disclose particulars of their case and identify the issues which remain between them. There is no reason why the fresh evidence the defendants put in should not have been obtained well before the trial. I refer both to the video evidence and the evidence on future care. The defendants had given no indication in their schedules before trial that the point would be taken that the damages for future care should be reduced by reason of the claimant's pre-existing asthma.

43. Counsel for the defendants, Mr Geraint Jones, has submitted, by way of explanation for the late obtaining of the evidence, that the defendants had a reasonable expectation that the claimant would, under cross-examination, make such admissions that the further evidence would not be necessary. She was cross-examined on both issues. Notably, she would accept that by the time of trial she had made a substantial recovery from her injuries.

44. There was no evidential basis whatsoever for any such expectation. The prognosis given by the consultant psychiatrist, instructed on behalf of the claimant, whose reports had been disclosed, expressed the opinion that: *'As stated previously, it is probable that any further progress will be minimal.'*

45. I have no hesitation in accepting that the judge was entitled to reach the conclusion he did in those circumstances.

46. I would only add that it is unfortunate that the need for adjournments arose in this case. I have referred to a seven-week adjournment. There was a further adjournment for a period of two and a half months before the trial was concluded on 25 January 1999. There is no suggestion that the judge was in any way at fault with respect to the listing of the case. In a case of this seriousness it is important that all concerned should attempt to list in such a way that the trial can be concluded without the need for adjournments such as those which occurred in this case. I would express the hope that in cases of this kind on circuit, listings can be arranged so as to avoid such adjournments.

I would dismiss this appeal.

LORD WOOLF MR. I also agree with both judgments.

47. I would like to stress the importance of the comments made by Judge LJ as to the need when conducting litigation to make prompt disclosure of all relevant matters. I would also like to associate myself with the remarks made by Pill LJ as to the undesirability of adjournments of a trial such as occurred in this case. Such adjournments create additional difficulties in administering justice for the parties and the court. They should be avoided whenever possible. I appreciate that in this particular case, because of the difficulties which were caused by the manner in which the claimant gave evidence, it may have been unavoidable that problems arose with the arrangements for the trial.

48. The principle referred to by Judge LJ as to the parties conducting their litigation making full and proper disclosure is even more important now that the Civil Procedure Rules (CPR) have come into force. Under the CPR it is possible for the parties to make offers to settle before litigation commences. As to the disclosure required in relation to that procedure, protocols in specific areas of litigation make express provision. Even where there is no express provision contained in a relevant protocol applicable to the particular litigation, the approach reflected in the protocols should be adopted by parties generally in the conduct of their litigation.

49. If the process of making Pt 36 offers before the commencement of litigation is to work in the way which the CPR intend, the parties must be provided with the information which they require in order to assess whether to make an offer or whether to accept that offer. Where offers are not accepted, the CPR make provision as to what are to be the cost consequences (CPR 36.20 and 36.21). Both those rules deal with the usual consequences of not accepting an offer which, when judged in the light of the litigation, should have been accepted.

50. I also draw attention to the fact that the rules refer to the power of the court to make other orders and make it clear that the normal cost consequence of failing to beat the sum paid in does not apply when it is unjust that it should do so. If a party has not enabled another party to properly assess whether or not to make an or offer, or whether or not to accept an offer which is made, because of non-disclosure to the other party of material matters, or if a party comes to a decision which is different from that which would have been reached if there had been proper disclosure, that is a material matter for a court to take into account in considering what orders it should make. This is of particular significance so far as defendants are concerned because of the power of the court to order additional interest in situations where an offer by a claimant is not accepted by a defendant. We have to move away from the situation where litigation is conducted in a manner which means that another party cannot take those precautions to protect his or her position, which the rules intend them to have.

51. For the reasons indicated by Pill and Judge LJJ, this appeal will be dismissed.

Appeal dismissed.

Geraint Jones (instructed by Palser Grossman, Cardiff) for the defendants.
Philip Davies (instructed by Martyn Prowel Edwards & Davies, Cardiff) for the claimant.