

SCOTTISH LEGAL AID BOARD

MESSRS MULLANE & CO RE [REDACTED] (ACCOUNT NUMBER 4275662914)

CRIMINAL LEGAL AID - SOLEMN

BACKGROUND AND ISSUES

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This case proceeded to taxation before the Auditor - Ken Carter - in Glasgow on 23 December 2015. The account arose from solemn proceedings, quite serious, in connection with a charge of severe injury and permanent disfigurement arising from an incident that had taken place in a flat in Glasgow. On the face of it, the incident was contained within the flat although, at taxation, it was suggested that important evidence in the form of blood stains could be found outside the flat on the landing.

The taxation involved a number of issues but the important ones, for our purposes, were:

- Was a locus inspection - indeed two locus inspections - necessary in this case
- Was the solicitor entitled to charge from travel from her home to attend the locus, both at weekends, rather than her business address in Drumchapel which was nearer the locus
- Were photographs necessary in this case and, if so, were so many photographs necessary
- Could the solicitor have taken photographs (or had photographs taken at the first inspection thus avoiding a second inspection)?
- Was it appropriate for [REDACTED] to be instructed in this case?
[REDACTED]

A copy of the Board's Points of Objection is attached to this Note.

AUDITOR'S DECISION ON ESSENTIAL ISSUES

The Auditor wrote on his decision in the form of adjustments to the account entries at issue, **at the end of this Note**. The important points for the purpose of assessing future accounts are as follows:

Locus inspections

The Auditor allowed the first locus visit but refused the second (at least as a locus visit, see below). Mr Carter was quite clear in his expressed view that he could not see any reason why a second locus visit would be appropriate unless in the most exceptional of circumstances. He did not see any exceptional circumstances in this case. It was put to him (many times) that the solicitor had to see the locus and only then make an informed decision as to whether photographs required to be taken. This line of argument was rejected by the Auditor. So the position of the Auditor in Glasgow is very clear on this issue.

As it happened, the second locus visit was actually allowed on further submissions made by Ms Mullane that she had to visit her client at home, as he was housebound, and that she should be paid to that extent. There was actually a fairly obscure reference in a letter of 18 December 2015 from Ms Mullane which stated that "*The client has suffered a lot of illnesses including crippled feet and has had operations in his feet and his back*". Clearly by the time we had got to taxation there was no real way of establishing this one way or the other and the Auditor (basically in order to keep matters moving) allowed a reduced attendance for this purpose, having lost the will to live after almost two hours of submissions (very little from our side).

However, the principal point is an important one for us and supports our practice - subject to quite exceptional circumstances - that a locus visit has to be necessary and that we will only allow one locus visit.

Travel to locus

Again the Auditor's decision was clear and immutable. He stated that it was commendable that the solicitor should attend the locus at the weekend but accepted our position that the normal commercial approach/practice has to apply. A solicitor cannot charge a higher fee for travel from the solicitor's home address (the other side of Dumbarton in this case as distinct from the office address in Drumchapel) simply because the solicitor undertakes work from their home address. The Auditor stated that this was normal commercial practice. He stated that this would be his approach in taxing a judicial account and that it was even less appropriate that public funds should be asked to pay the extra cost of travel in such circumstances.

Ms Mullane's further submissions on this point were answered with a simple statement from the Auditor that this was clear taxation practice.

Were photographs necessary and, if so, were so many necessary?

The final decision of the Auditor was that photographs were necessary in this case. Ms Mullane made lengthy submissions regarding the importance of the blood groupings etc. both within and outwith the flat and that these were important from the point of view as to whether there was self-defence. None of these arguments had featured large (if at all) in the correspondence with the Board prior to the taxation or indeed in the account itself. I pointed out that the photographs were very general and, given that it was accepted that both the victim and the assailant were bleeding, how could the respective blood stains be identified. Had forensic evidence been obtained? Had the Crown produced photographs? I think the answer I received when I asked whether a special defence of self defence had actually been lodged at any time was "no". However, on balance, the Auditor, in the circumstances of this case, held that it was a very serious charge and did not find himself in a position to refuse to pay for photographs at all. The whole aspect of what locus photographs were available from the Crown or indeed the Crown case was totally absent.

The Auditor having made his decision that photographs were necessary in this case, I raised the issue, with reference to the book of photographs, as to whether *all* the photographs were necessary. The Auditor, having examined the book of photographs held that three of the photographs were not necessary. The first group of photographs were photographs of the exterior of the building, approaching the building, entering the lobby, entering the lift etc. The Auditor disallowed three photographs and, of course, all the copies of these photographs, despite Ms Mullane repeatedly muttering "professional discretion". Ms Mullane threatened to take a Note of Objections against any decision of the Auditor to restrict the number of photographs on the basis that the photographs taken were at the professional discretion of the solicitor and could not be interfered with. The Auditor was not impressed with this argument, nor should we be.

Whilst accepting that the photographs have to show the broad locus as well as the particular locus, the photographs in this case were far too many. Another Auditor might well take out even more photographs in different circumstances.

Could the solicitor have taken photographs himself/herself?

I ran the argument that it was quite competent for a solicitor to take photographs themselves and to clear this with the prosecution. However, I have my doubts about this as an argument certainly in the context of a serious solemn case. Ms Mullane as well as raising professional issues (as we would expect) also raised, perhaps with some more justification, the practical issues of dealing with a specific procurator fiscal who would be available to discuss the case prior to the trial and would actually be there on the day.

The Auditor accepted that in this case it was appropriate to use the services of a professional photographer. I think this argument could possibly be run in the context of a summary case especially where the photographs are simply for helpful information and are not material to the issue at hand. I do not think we are in a position to *insist* in most cases that a solicitor take their own photographs as a production. There are clear practical and evidential issues arising from this in serious cases.

Was it appropriate for [REDACTED] to be instructed in this case?

The particular issue in this case, of course, was that the “professional photographer” was [REDACTED]. This had not been made clear in the early part of the diet during which Ms Mullane was at pains to stress the professional distance required of a photographer. The Auditor was, therefore, clearly surprised when I mentioned the fact that the photographer was [REDACTED] who apparently has an HND in photography. However, I had to concede that there was nothing wrong in this but that in such circumstances, raising the issue of personal interest, be a greater onus on the solicitor, given the family connections, to justify the employment of a photographer and the level of remuneration paid to that photographer. I mentioned that it was perhaps something that Ms Mullane should have raised sooner in the taxation.

ACTION POINTS

Before dealing with a couple of action points, I think I should say that Ms Mullane adopted a very personal approach to the matter saying that she was being picked on by a particular individual in the Board and that she was there representing the profession at large, and in particular younger solicitors, from the attempts of the Board to suppress justice etc. etc.

The two areas in which I found it really difficult to state the Board’s case as regards the level of cost incurred in the taking of these photographs was that we had (1) no “ballpark” figures (if I can use that expression) for the cost of taking a photograph or (2) producing copies of that photograph.

We had the sketchiest of information, briefly trawled from the internet, as to the general cost/the cost of a print. Unfortunately, one of these had a figure per print not far off what [REDACTED] had charged, but that photographer’s charge for taking a photograph was much lower. Ms Mullane actually said that **WE** had identified the figure per copy and that she was simply applying it. I clearly was not in a position to comment on that.

I think it would be really helpful if we undertook a trawl of accounts over the next few weeks identifying the costs from various solemn cases - many of which must feature both the taking of a photograph and the cost of copies. If we pull that information together, then we would have some sort of a benchmark, and we may even be able to assist the profession as to the levels of expenditure that we would expect to see.

Details of Taxed – off items from SLAB account at Taxation Diet of 23 December 2015;

Account lodged by Mullane & Co for accused [REDACTED] A/C REF 4275662914 FOR £ 1,340-50

<u>TABLE 1</u>				
Date	Details	Sum in claim	Sum taxed -off	Sub –total taxed off
10/8/14	Travel to locus (time)	24.40	-12.20	
10/8/14	Return travel (time)	18.30	- 9.15	
10/8/14	Mileage	19.20	- 7.20	- 28.55
6/9/14	Travel to locus time	24.40	-12.20	
6/9/14	Return travel time	18.30	- 9.15	
6/9/14	Mileage	19.20	- 7.20	- 28.55
				= - £ 57 . 10 off fees
6/9/14	[REDACTED]	516.40 inc. vat	- 96.80 inc vat	- £ 96. 80 off outlays
				= £ 153- 90p total taxed off i.e. 11.48 % taxed off- see Table 3.
<u>TABLE 2</u>		Sum in claim	Sum taxed -off	
15/6/15	a/c as lodged on 15/6/15 for total of :	£ 1,340-50	-£ 153 - 90p	Account taxed at = £1,186-60 i.e. 88.52% see table 3
<u>TABLE 3 taxation fees apportionment</u>				
23/12/15	Taxation fees total due to Auditor of Court on total sum of account as lodged incl. a/c lodging fee and VAT	£ 112-32		
23/12/15	11.48 % of which due by Mullane & Co in accord with precise apportionment related to taxed off sum from total account	£ 12-89	i.e. £10.74 + vat £2.15	
23/12/15	88.52 % of which due by SLAB in accord with apportionment as above.	£ 99.43	i.e. £82.86 + vat £16.57	

SCOTTISH LEGAL AID BOARD

POINTS OF OBJECTION

<i>Assisted Person's Name</i>	██████████
<i>Legal Aid Reference</i>	SL4275662914
<i>Solicitor's Name</i>	Angela Mullane, Mullane & Co.
<i>Date of taxation & location</i>	Auditor, Glasgow Sheriff Court 23 December 2015
<i>Type of case</i>	Solemn Criminal

1. Nature of case

The nominated solicitor applied for and was granted solemn criminal legal aid to represent the accused in respect of charges relating to assault to severe injury and permanent disfigurement, arising from an incident on 9 July 2014.

2. Fees/outlays allowable to solicitors

Solicitors are entitled to payment in terms of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 (the fees regulations).

It is those regulations that provide for taxation in terms of regulation 11(1)(c).

“11. –(1) If any question or dispute arises between the Board and a solicitor or counsel as to the amount of fees or outlays allowable to the solicitor, or as to the amount of fees allowable to counsel, from the Fund in respect of legal aid in criminal proceedings in-

(c) the sheriff or district court, the matter shall be referred for taxation to the auditor of the sheriff court for the district in which those proceedings took place.

(3) The Board and any other party to a reference under paragraph (1)(a) or (c) shall have the right to state written objections to the High Court or, as the case may be, the sheriff in relation to the report of the auditor within 14 days of issue of such report and the Board and any such other party may be heard thereon.”

Also, regulations 7 and 8 of the fees regulations set out the standard of taxation to be applied to an account, and form the basis on which solicitors' fees and outlays should be assessed,

“7. (1) Subject to the provisions of regulations 4, 5, 6 and 9, a solicitor shall be allowed such amount of fees as shall be determined to be reasonable remuneration for work actually and reasonably done, and travel and waiting time actually and reasonably undertaken or incurred, due regard being had to economy. The fees allowed shall be calculated in accordance with Schedule 1...”

“8. (1) A solicitor shall be allowed the following outlays, due regard being had to economy -

(c) any out of pocket expenses actually and reasonably incurred, provided that without prejudice to any other claims for outlays there shall not be allowed to a solicitor outlays representing posts and incidents.”

3. Nature of dispute

In this case the solicitor elected to undertake a locus inspection on Sunday 10 August 2014, four weeks after the incident. This involved return travel to 34 Scaraway Terrace, Milton, Glasgow from Dumbarton (48 miles travelled and time engaged of 2 hours), presumably from the solicitor’s home address given that Ms Mullane’s office address is 18 Drumchapel Road, Glasgow (approximately 8 miles from the *locus*). Total charge against the Fund is **£67.10 fees** and **£19.20 mileage**.

This was followed up with a further attendance on the locus on Saturday 6 September 2014. Again, this is charged from Dumbarton at a total cost of **£67.10 fees** and **£19.20 mileage**.

A photographer ([REDACTED]) was instructed on this occasion to attend and photograph the locus with the resultant outlay being **£516.40**.

Both attendances at the locus and the resultant costs incurred (including those arising from the decision to travel from the solicitor’s place of business rather than her office) have been subject to challenge by SLAB and these abatements form part of the offer intimated 29 June 2015. In summary:

- Why was a locus inspection necessary at all in this case?
- Why were photographs necessary in this case?
- If we accept that a locus inspection was reasonable in the circumstances of this case, why could the solicitor not have taken photographs or had photographs taken at the first inspection, thus avoiding a second inspection?
- Why was the decision taken to attend at locus on both occasions at the weekend thus incurring greater travelling costs and time than otherwise would have been incurred in the event solicitor had travelled from her business address?
- Why was [REDACTED] instructed in this case, and what efforts were made to obtain competitive estimates from other photographers?

4. SLAB’s Position

Given the level of detail provided in the account as rendered, the Assessment Officer considering the account could not form the view that the work was “*reasonably done*” nor that the resultant expenses were “*reasonably incurred*”. Accordingly, the sums sought were abated in their entirety and enquiry made of the solicitor as to why, in the first instance, the locus required to be visited and how did the locus itself relate to the client’s defence? In respect of the second inspection, clarification was sought as to why

photographs were required and why the solicitor did not take photographs herself at the first inspection?

The accused appeared on petition at Glasgow Sheriff Court on 10 July 2014 charged with assault to severe injury and permanent disfigurement.

Based on the summary of evidence, the incident took place within the home address of the accused, [REDACTED] in the early hours of 9 July 2014 and involved the accused [REDACTED] his partner [REDACTED] and her brother (and friend of the accused) [REDACTED] who is also the complainer. All parties were consuming alcohol

and an argument broke out following [REDACTED] urinating on the carpet in a bedroom which resulted in the complainer punching the bedroom door causing two holes and the accused allegedly striking the complainer across the head with a glass, cutting his head in the process as well as cutting his own finger. On entering the locus, “*...police noted a large amount of blood on the floor of one of the bedrooms and a broken glass in the hallway*”.

According to the summary of evidence, the accused’s position was that he had been attacked by [REDACTED]

10 August 2014 - First attendance upon locus

The first attendance upon the locus took place on 10 August 2014, a month after the incident took place. Ms Mullane advises in her letter of 24 July 2015 that this visit was prompted by the client advising that “*...blood was still visible at the flat and outside...*”.

It is not immediately clear *when* the client advised Ms Mullane of this but, based on the detail within the account, one assumes it was at the first hearing on petition on 10 July 2014 given it appears to be the only meeting with the client. It is also unclear why a period of a month would be allowed to lapse before visiting the locus given that in the interim period the blood, certainly outside of the address, could presumably have been cleaned up.

In any event, assuming that some form of communication between client and solicitor has taken place *after* the first appearance but not charged for within the account, the merits of a locus inspection prompted by there being signs of blood *still* evident at the address are, in our view, questionable. Given the injuries to *both* complainer and accused, it is presumably

no surprise that blood stains were visible inside and outside of the address but that in itself does not, in our view, demonstrate why such a visit was necessary and justify the resultant costs.

Furthermore, even if agents demonstrated that the inspection of the locus was reasonably done, it is unclear why the decision was taken to attend on a Sunday and, as a consequence, base return travel time and costs on the solicitor’s home address in Dumbarton. The differential in return mileage when compared to travel from the solicitor’s place of business is 33 miles. Clearly return travel time would also be less.

6 September 2014 - Second attendance upon the locus

Ms Mullane advises that, on attending upon the locus on 10 August and seeing the damage to the door, she “*...observed the necessity to make a record...*” of the damage and so

returned on 6 September 2014 (Saturday) with a professional photographer ([REDACTED]). Again the travel time and mileage costs incurred are based on return travel from Dumbarton as opposed to Drumchapel so my earlier observations apply. More significantly, the photographer's costs incurred by the solicitor on this occasion are **£516.40**.

[REDACTED]

It is clear from the summary of evidence that the door sustained damage during the disturbance so presumably Ms Mullane would be aware of this from the outset having considered the initiating documentation. The client could also have confirmed with his solicitor at the same time as he confirmed bloodstains were still visible that the holes in the door were still present. Rather than reacting to the holes in the door as necessitating a further visit but with a photographer present to record the damage, perhaps photographs could have simply been taken by on 10 August 2014, thus avoiding a substantial outlay.

In accordance with regulation 8(c) of the Fees Regulations, "**out of pocket expenses actually and reasonably incurred**" will be paid. To that end we are not persuaded that it was an outlay reasonably incurred on the basis that it has not been demonstrated that the employment of a professional photographer was appropriate or necessary.

Furthermore, "**reasonably incurred**" also implies that the solicitor incurring such an out of pocket expense has satisfied him/her self that the resultant costs are indeed reasonable. Our position is that, to arrive at this conclusion would presumably involve efforts on the part of the instructing solicitor to obtain competitive estimates from other photographers. There is no evidence that this course of action was followed by Ms Mullane.

It is also unclear how [REDACTED] was actually identified for the purpose of instruction. An internet enquiry of this firm produced no 'hits' and does not appear to feature in the usual listings of businesses such as 'thomsonlocal.com', 'yell.com' etc. Also, while the invoice provides a postal address of [REDACTED] there are no other contact details such as telephone number(s) or email address. It may be of course that Ms Mullane has instructed this photographer on previous occasions and simply instructs as a matter of routine when required.

5. Solicitor's Position

Ms Mullane's letter dated 24 July 2015 was brief in its response to the abatements proposed in respect of the locus inspections in question and in the following terms:

"Client had indicated to us that he had been attacked and the blood was still visible at the flat and outside, hence the locus check on 10th August, to note that his door was damaged as he had smashed it himself and observed the necessity to make a record of these and we did so on 6th September".

(Our reply of 14 August 2015 confirmed that while other ancillary abatements could be removed and certain fees reinstated, further enquiry was made of the purpose of the locus inspection of 10 August and further detail requested.)

No further communication was received from Ms Mullane, at that stage, who elected to lodge the account for taxation with the Auditor of Glasgow Sheriff Court.

(On receiving intimation of this from the auditor by email of 22 September 2015, a further letter was sent to Ms Mullane 24 September 2015 suggesting that taxation was premature and again requesting the detail sought in our previous letter of 14 August. Additional detail and information was requested to assist in our consideration. A reminder to our last letter was sent out 23 October 2015.)

A letter of 4 December 2015 from the solicitor, and copied to the auditor, sets out the solicitor's position.