

AUDITOR OF THE COURT OF SESSION

PARLIAMENT HOUSE, EDINBURGH, EH1 1RQ
RUTLAND EXCHANGE No. 304
031 225 2595 Extn. 309

Senior Counsel's Fee

in causa

WG

[REDACTED]

Pursuer

against

PW

[REDACTED]

and Others

Defenders

EDINBURGH. 21st May 1992.

The Auditor has been asked to tax the amount of the fee payable to senior Counsel for [REDACTED] in respect of the conduct of the Proof.

For the sake of brevity, the Auditor refers to his Note dated 17th March 1992 fixing the amount of the additional responsibility fee payable to the solicitors for the Pursuer in this case. That Note sets out the circumstances giving rise to the action and the work which required to be carried out for the presentation of the case. As mentioned in that Note, the solicitors were faced with considerable difficulties and these difficulties were certainly as great, if not greater, for Counsel who had to give careful consideration to diverse possible factual scenarios, each of which bore upon the fundamental questions of causation and liability.

The case involved complex issues of law and opinions from several medical experts were required to assist in consideration of the various possible factual circumstances.

The proof in the action took 13 days spread over June and July 1991 and there were five consultations. A large number of documents and reports had to be read and considered.

Schedule 4 of the Civil Legal Aid (Scotland) (Fees) Regulations of 1989 as amended contains a Table of Fees, Chapter 2 of which relates to those payable to senior Counsel and paragraph 5 of which Day in Court prescribes a basic fee of £296.50. The Schedule commences with a number of General

Rules, number 4 of which confers on the Auditor power to increase any fee set out in the Table of Fees in the Schedule where he is satisfied that because of the particular complexity or difficulty of the work or any other particular circumstances, such an increase is necessary to provide reasonable remuneration for the work.

Counsel has proposed a charge of £850 per day and the Scottish Legal Aid Board has proposed £650 per day on the basis that it reflects a percentage increase equivalent to that awarded to the solicitors.

In giving consideration to the proper fee to be allowed to Counsel in this case, the Auditor has referred to the opinion expressed by Lord Mackintosh in *Elas v Scottish Motor Traction Company Limited* 1950 S.L.T. 397 where he said:

"In my opinion it was the duty of the auditor in the exercise of his own skilled discretion to determine what was a fair and reasonable fee to be paid to Counsel in this particular case and in the circumstances of the present time, and not to have been deflected from that aim either by reference to any scale of fees which he may have understood to have been propounded by the Faculty of Advocates or by waiting for some direction from the Court or general consensus of opinion in the profession regarding the proper fees to be paid to Counsel. There is not and never has been any rigid scale of fees for Counsel. As was stated by Lord President Clyde in *Caledonian Railway Co v Greenock Corporation* 1922 S.C. 288, 1922 S.L.T.30, "both the 'normal' fee in an ordinary case and the 'proper' fee in a big and difficult one are just such fees as a practising law agent finds sufficient in order to command the services of competent Counsel in cases of a similar character". In taxing the present account therefore the auditor in my opinion should have had in his consideration not any supposed scale of fees propounded by the Faculty of Advocates or any other body or person - which in my view was an irrelevant consideration - but first and foremost the amount of the fee which the pursuer's solicitor had seen fit to send to his Counsel and in the second place the view which his (the auditor's) own skill and experience in taxing accounts in similar cases had led him to form upon the question whether the fee which had been sent by the instructing solicitor was in all the circumstances of the case a reasonable fee or an extravagant one."

In this case the fee proposed is not one prescribed by the Faculty of Advocates nor is it one which has been sent by the solicitor. The Auditor is, however, of opinion that the fees for Counsel as prescribed in the Schedule are intended to be fees for what might be termed 'ordinary' or 'run-of-the-mill' cases and by no shrinkage of imagination could [REDACTED] case be so classified.

The Schedule recognises that there will be cases where the prescribed fee does not provide reasonable remuneration for the work performed and the Auditor is satisfied that in this difficult case in which the Court's judgment runs to 123 pages a substantially increased daily rate is merited.

As to the level of the increase, the Auditor is of opinion, having regard to the terms of the relevant General Rule and the quoted judicial opinion that the fee to provide Counsel reasonable remuneration in this legal aid case for the considerable preparation for and conduct of a 13-day proof in an alleged medical negligence claim which involved complex questions of fact and law, is NINE THOUSAND ONE HUNDRED POUNDS (£9,100.00).


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£700 per day